Supreme Court, U.S.
FILED

091374 MAY 10 2010

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Petitioners,

v.

LOGAN T. JOHNSTON, III,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

DONALD B. AYER
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-4689

Co-Counsel for Petitioner

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 North Central Ave.
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@LRLaw.com

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Does 11 U.S.C. § 362(k)(1) (formerly § 362(h)) specifying that an individual "injured" by a willful violation of the Bankruptcy Code automatic stay "shall recover actual damages" encompass compensation for emotional distress?

LIST OF PARTIES

Melvin Sternberg and his law firm, Sternberg & Singer, Ltd., are the sole petitioners. Logan T. Johnston, III is the sole respondent. Other individuals initially named as parties to the case were dismissed before the Ninth Circuit opinion was issued.

RULE 14.1 AND 29.6 STATEMENT

There are no corporate parties or parent corporations of parties in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 14.1 AND 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Statutory Background	3
B. Proceedings Below	3
REASONS FOR GRANTING THE PETITION	6
I. The Circuits Are Divided Over Emotional Distress Damages for Stay Violations	7
II. Bankruptcy Case Filings are Increasing and Emotional Distress Stay Litigation is Extensive and Proliferating Rapidly	11
III. Actual Damages Under Section 362(h) Do Not Include Emotional Distress Damages	16
A. The Statutory Language Does Not Support Emotional Distress Damages	16
B. The Historical Context of Section 362(h) Is Inconsistent With Emotional Distress Damages	17

TABLE OF CONTENTS – Continued

Page

C. Allowing Recovery of Emotional Distress Damages Has Produced Wildly Inconsistent Outcomes 21

CONCLUSION 24

APPENDICES:

Ninth Circuit Court of Appeals Opinion and Order: *Sternberg, et al. v. Johnston*, 585 F.3d 937 (9th Cir. 2009) .....App. 1-24

United States District Court for the District of Arizona Order: *Sternberg, et al. v. Johnston*, No. CV-06-2115-PHX-ROS (September 14, 2007) .....App. 25-33

United States Bankruptcy Court, District of Arizona Judgment Against Melvin Sternberg: *In re Logan T. Johnston, III*, No. 01-06221-ECF-SSC (August 10, 2006) .....App. 34-35

United States Bankruptcy Court, District of Arizona Memorandum Decision: *In re Logan T. Johnston, III*, No. 01-06221-PHX-SSC (July 27, 2006).....App. 36-48

United States Bankruptcy Court, District of Arizona Memorandum Decision As To Defendant Sternberg Only: *In re Logan T. Johnston, III*, No. 01-06221-PHX-SSC (March 31, 2006) .....App. 49-96

TABLE OF CONTENTS – Continued

Page

United States Court of Appeals for the Ninth Circuit, Motion to Inform the Court of the Position of the United States: *Dawson v. Washington Mutual Bank,* No. 02-16903 (January 28, 2005) .....App. 97-99

11 U.S.C. § 362.....App. 100-101

Chart of Cases .....App. 102-127

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001) 7, 8, 14, 22

Banai v. Secretary, HUD, 102 F.3d 1203 (11th Cir. 1997) 17

Brown v. Chesnut (In re Chesnut), 422 F.3d 298 (5th Cir. 2005) 12, 18

Budget Serv. Co. v. Better Homes, 804 F.2d 289 (4th Cir. 1986) 11

Carey v. Piphus, 435 U.S. 247 (1978) 17

Citizens Bank v. Strumpf, 37 F.3d 155 (4th Cir. 1994), *rev'd on other grounds*, 516 U.S. 16 (1995) 11

Conn. Ry. & Lighting Co. v. Palmer, 305 U.S. 493 (1939) 16

In re Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir. 1990) 18

Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 367 F.3d 1174 (9th Cir.), *rev'd*, 390 F.3d 1139 (9th Cir. 2004) 9, 10

Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139 (9th Cir. 2004), *cert. denied*, 546 U.S. 927, 126 S. Ct. 397 (2005) ..... *passim*

Dewsnup v. Timm, 502 U.S. 410 (1992) 20

Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1 (B.A.P. 9th Cir. 2002) 7, 14

Field v. Mans, 516 U.S. 59 (1995) 19

TABLE OF AUTHORITIES – Continued

Page

Fleet Mortg. Group v. Kaneb, 196 F.3d 265 (1st Cir. 1999) 10, 11, 12, 14, 22

In re Griffin, 415 B.R. 64 (Bankr. N.D.N.Y. 2009) 12

Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539 (11th Cir. 1996) 12

Mackie v. Rieser, 296 F.3d 909 (9th Cir. 2002), *cert. denied*, 537 U.S. 1189 (2003) 16

Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.), 920 F.2d 183 (2d Cir. 1990) 20

McBride v. Coleman, 955 F.2d 571 (8th Cir. 1992) 19

Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 17

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 18

Pertuso v. Ford Motor Credit Co., 233 F.3d 417 (6th Cir. 2000) 18

Price v. Rochford, 947 F.2d 829 (7th Cir. 1991) 18

Price v. United States, 42 F.3d 1068 (7th Cir. 1994) 11, 12

In re Repine, 536 F.3d 512 (5th Cir. 2008) 10

Ryan v. Foster & Marshall, Inc., 556 F.2d 460 (9th Cir. 1977) 8, 16

In re Skeen, 248 B.R. 312 (Bankr. E.D. Tenn. 2000) 21

TABLE OF AUTHORITIES – Continued

Page

In re Torres, 432 F.3d 20 (1st Cir. 2005) 10, 12

United States v. Flynn (In re Flynn), 185 B.R. 89 (S.D. Ga. 1995) 22

United States v. Harchar, 331 B.R. 720 (N.D. Ohio 2005) 8

Wagner v. Ivory (In re Wagner), 74 B.R. 898 (Bankr. E.D. Pa. 1987) 22

In re Walters, 868 F.2d 665 (4th Cir. 1989) 19

RULES, REGULATIONS AND STATUTES

Public Laws:

Pub. L. No. 109-8 § 305(1)(B), (C) (2005) 2

Pub. L. No. 98-353 § 304, 98 Stat. 352 (1984).....18

United States Code:

11 U.S.C. § 362(a).....3, 12

11 U.S.C. § 362(b)(2)(B) 4

11 U.S.C. § 362(k)(1) (formerly § 362(h)) .....*passim*

28 U.S.C. § 157 2

28 U.S.C. § 158 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1334 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Brief for the United States as *Amicus Curiae*, 2004 WL 545822, filed in *Stinson v. Cook Perkiss & Lew (In re Stinson)*, 128 Fed. Appx. 30, 2005 WL 736668 (9th Cir. Apr. 1, 2005) 15

Dan Dobbs, LAW OF REMEDIES § 2.6(4) (2d ed. 1993) 8

National Bankruptcy Research Center, December 2009 Bankruptcy Filings Report, *available at* http://www.nbkrc.com/December2009_News.aspx 12

National Bankruptcy Research Center, March 2010 Bankruptcy Filings Report, *available at* http://www.nbkrc.com/March2010_News.aspx 13

3 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY § 362.LH (15th rev. ed. 2009) 18

RESTATEMENT (SECOND) OF TORTS § 912, cmt. b (1977) 16

W. E. Shipley, Note: Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property, 28 A.L.R.2d 1070 (1953) 19

Joel E. Smith, Annotation, *Recovery by Debt, or, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R.3d 201 (1978) 19

www.StayViolation.com 15

Melvin Sternberg and his law firm hereby petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Ninth Circuit in *Sternberg v. Johnston*, Case Nos. 07-16870 and 08-15271.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 595 F.3d 937 (9th Cir. 2010) and attached in Petition Appendix ("Pet. App.") 1. The September 14, 2007 order of the United States District Court for the District of Arizona in this case is unreported and set forth as Pet. App. 25. The March 31, 2006 memorandum decision as to Sternberg only, July 27, 2006 memorandum decision on reconsideration and August 10, 2006 judgment against Melvin Sternberg entered by the United States Bankruptcy Court for the District of Arizona are unreported and attached as Pet. App. 49, 36 and 34. After consultation with the Clerk of the Court, bulky exhibits to the trial court's decisions have been omitted. Previous decisions in the case by the District Court on September 30, 2004 as amended on February 11, 2005, and by the Bankruptcy Court on August 8, 2003 are reported at 321 B.R. 262 (D. Ariz. 2005) and 308 B.R. 469 (Bankr. D. Ariz. 2003).

JURISDICTION

The second amended opinion of the Ninth Circuit was entered on February 8, 2010. Pet. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the bankruptcy court and district court were invoked, as is typical, under 28 U.S.C. §§ 157, 158 and 1334.

STATUTES INVOLVED

The relevant provisions of the United States Bankruptcy Code are set forth in full in Pet. App. 100-01. The key section provides in relevant part: "Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h), now § 362(k)(1).[1]

[1] Section 362(h) of the Bankruptcy Code was renumbered as Section 362(k)(1) but otherwise unchanged in 2005. Pub. L. No. 109-8 § 305(1)(B), (C) (2005). The actions at issue took place before the amendment. To avoid confusion, Section 362(h) is used for all section references in this petition.

STATEMENT OF THE CASE

A. Statutory Background

The filing of a bankruptcy petition immediately gives rise to an "automatic stay," which prohibits commencement or continuation of certain collection actions against the debtor. 11 U.S.C. § 362(a). The Bankruptcy Code further mandates that "an individual injured by any willful violation" of the automatic stay "shall recover actual damages." *Id.* § 362(h). In this context, the courts of appeals have uniformly held that the willful violation requirement is met and the creditor is liable for mandatory automatic stay damages even if the violation was in good faith or inadvertent, so long as action was taken with notice of the bankruptcy filing. *See* citations at page 11, *infra*.

Emotional distress stay violation cases generally concern entities or individuals failing to stop an account freeze, refund, set off or the like quickly enough after receiving notice of a bankruptcy filing. *See* citations at page 12, *infra*. In other cases, like petitioner's, there is a dispute over stay applicability and the court ultimately determines that the stay was in fact violated. The debtor typically claims damages for embarrassment, sleeplessness and anxiety. *See* chart attached as Pet. App. 102-27.

B. Proceedings Below

Petitioners here are a lawyer and a law firm who were pursuing spousal maintenance obligations from their client's ex-husband. Pet. App. 4. On May 17,

2001, the state trial court held an evidentiary hearing on whether respondent Logan Johnston should be held in contempt for failing to pay spousal maintenance. Only then did Mr. Johnston notify the court he had filed a bankruptcy petition three days earlier. Pet. App. 4-5, 53-54.

Two months later, on July 13, the court entered and mailed to the parties a civil contempt order to incarcerate Mr. Johnston on August 1 if he failed to pay delinquent spousal maintenance. The order was a surprise to all because the judge had, upon being told about the bankruptcy at the May 17 hearing, said she would proceed to hear the arrearage and contempt issues and would not consider sanctions until later, after counsel researched her jurisdiction. Pet. App. 5, 54-55.

Petitioner Sternberg did not, on behalf of his client, attempt to enforce the state contempt order. Pet. App. 59, 78. The debtor nevertheless alleged a stay violation because petitioners also did not affirmatively seek to invalidate the contempt order on the ground that Johnston had filed bankruptcy. Pet. App. 6-8, 52. This affirmative duty arises because creditors, not debtors, are responsible to correct stay violations and a state contempt order violates the stay insofar as it necessitates payment from bankruptcy estate property. 11 U.S.C. § 362(b)(2)(B); Pet. App. 11-14. Nor did petitioners, in subsequent proceedings, spell out that the contempt order should be modified to preclude recovery against bankruptcy estate assets and preclude incarcerating Johnston if

there were insufficient non-estate assets to pay the judgment amount. Pet. App. 13, 56.

On July 31, the day before the incarceration was to commence, on the debtor's motion the state appellate court entered an order staying the contempt order and the bankruptcy court vacated the contempt order as void because Johnston lacked sufficient non-bankruptcy estate assets to pay the amount due. Pet. App. 6, 57. Johnston sued the state court judge, his ex-wife and petitioners for damages under 11 U.S.C. § 362(h) for a willful violation of the stay. He later dismissed the adversary complaint against his ex-wife and the state court judge. Pet. App. 49-51.

The bankruptcy court initially decided that petitioners had not willfully violated the stay, but the district court (sitting as a reviewing court), reversed and remanded. Pet. App. 7-8. On remand and over petitioners' objection, the bankruptcy court heard Johnston's testimony of his emotional reaction to the state contempt order. Johnston said that during the 6 ½ work days that elapsed between his receipt of the state contempt order and its subsequent vacatur by the bankruptcy court, he suffered from an inability to work efficiently, a lack of enjoyment of life, and a concern about possible incarceration. Pet. App. 61-62; *see also* ER1204, 1316.

The bankruptcy court found that Johnston suffered actual damages of lost client billings in the amount of $2,883.20, that his testimony of extreme distress was "credible and palpable," and that fear of

incarceration and resulting potential loss of one's law practice would cause a reasonable person to suffer significant emotional harm. Pet. App. 62, 93-94. The court awarded $20,000 for this emotional harm and $69,986 for Johnston's attorneys' fees under Section 362(h). Pet. App. 95-96. The district court affirmed. Pet. App. 33.

The Ninth Circuit affirmed the award of emotional distress damages under Section 362(h). Pet. App. 23. The court said the issue did "not merit a lengthy discussion" because each of Sternberg's emotional distress arguments was "foreclosed by" its prior decision in *Dawson v. Wash. Mut. Bank, F.A. (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004) (*Dawson II*), *cert. denied*, 546 U.S. 927, 126 S. Ct. 397 (2005). Pet. App. 9, n. 1. It briefly stated that emotional distress damages could be recovered even though the violation was not egregious, and without corroborating evidence if, as the bankruptcy court found here, the circumstances made it obvious that a reasonable person would have suffered significant emotional harm. *Id.*

REASONS FOR GRANTING THE PETITION

This case raises the important question whether emotional distress damages, which are highly subjective and not quantifiable by anything objectively measurable, are recoverable as "actual damages" within the meaning of Bankruptcy Code Section 362(h). The Ninth Circuit's published decision exacerbates a clear

circuit split on the issue, and the plethora of divergent bankruptcy cases requires this Court's intervention. Although several circuits have not ruled on the issue, the split is sharply defined, both sides are fully articulated, and the split is highly unlikely to resolve itself.

Stay violation damages litigation has become a "cottage industry," *see Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11-12 (B.A.P. 9th Cir. 2002), and delaying resolution of the conflict will result in much litigation in the meantime – with the possibility of hundreds of creditors being made to pay damages that the law does not allow, or else engaging litigation resources to contest the issue unnecessarily if in fact damages for emotional distress are compensable. The issue on which the circuits are divided is starkly, and cleanly, presented here. Accordingly, this case provides an ideal opportunity for resolution of this important issue.

I. The Circuits Are Divided Over Emotional Distress Damages for Stay Violations.

In 2001, the Seventh Circuit held that damages resulting from emotional distress are not available under Section 362(h). *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 879-80 (7th Cir. 2001). Writing for the court, Judge Posner concluded that the protection of the automatic stay "is financial in character; it is not protection of peace of mind." *Id.* at 879. Section 362(h) was not drafted "to redress tort violations." *Id.* at 880.

The court noted the theoretical possibility that in extreme cases of extortion or intimidation coupled with financial injury, there might be equitable doctrines of judicial economy under which a bankruptcy court could theoretically use state tort law causes of action to "top off" the relief afforded under the Bankruptcy Code rather than bringing a second state law tort suit. *Id.* at 879. The court held, however, that such damages are not available under Section 362(h) itself, without "hitching" a tort action to a Section 362(h) action through the clean up doctrine.[2] *Id.* at 880; *see also Id.* at 881 ("There is no indication that Congress meant to change the fundamental character of bankruptcy remedies by enacting the new subsection [Section 362(h)]").[3]

---

[2] That doctrine is a theory of supplemental jurisdiction that permits courts of equity to dispose of an entire controversy as a matter of judicial economy by considering incidental or auxiliary legal causes of action. *See* Dan Dobbs, LAW OF REMEDIES § 2.6(4), at 180 (2d ed. 1993); *see also Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir. 1977) (Securities Acts authorize only "actual damages," but emotional distress damages awarded under common law tort claims pendent to Securities Act claims).

[3] While no other Circuit Courts have endorsed *Aiello*, the Northern District of Ohio has, in a careful opinion, concluded that the Sixth Circuit would follow *Aiello*, and reject *Dawson II*, and that decision has been followed in the Sixth Circuit. *United States v. Harchar*, 331 B.R. 720, 732 (N.D. Ohio 2005); *see* Pet. App. 114-15.

In 2004, the Ninth Circuit initially agreed. In *Dawson I* the court said it was

> persuaded by the Seventh Circuit's approach. The interests served by § 362(h) are economic. To be sure, intentional infliction of severe emotional distress sometimes can occur when a creditor willfully violates an automatic bankruptcy stay. State laws, however, provide tort remedies for intentional infliction of severe emotional distress, and § 362(h) does not duplicate those tort remedies. We hold that "actual damages" under § 362(h) do not include damages for emotional distress.

Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 367 F.3d 1174, 1180-81 (9th Cir. 2004) (*Dawson I*), *rev'd*, 390 F.3d 1139. The court further reasoned in *Dawson I* that the term "actual damages" in Section 362(h) is used in a variety of federal statutes not directly related to tort claims where it has been interpreted to refer to economic harm alone. *Id.* at 1179 (citing Copyright and Securities Act cases).

Upon motion for reconsideration the Ninth Circuit reversed its position. *Dawson II*, 390 F.3d at 1143. The court read Section 362(h)'s legislative history to exhibit concern for debtor harassment, and held that a debtor could recover emotional distress damages if he clearly established that he suffered significant harm and demonstrated a causal connection between that harm and the stay violation. It ruled this could be established through (1) corroborating

medical evidence, (2) the testimony of family members or other non-experts that the debtor manifested emotional distress, (3) a finding of egregious creditor conduct with readily apparent significant harm, or (4) "even if the violation of the automatic stay was not egregious, the circumstances may make it obvious that a reasonable person would suffer significant emotional harm." 390 F.3d at 1149-50.

In addition to the Ninth Circuit, the First Circuit has suggested that emotional distress damages for automatic stay violations under the Bankruptcy Code should be permitted but only where there is "specific information" about the distress rather than "generalized assertions." *Fleet Mortg. Group v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999). The First Circuit has subsequently described this discussion as *dicta*. *See In re Torres*, 432 F.3d 20, 28-29 (1st Cir. 2005). Nevertheless, other courts, especially within the First Circuit, cite *Fleet Mortgage* for the proposition that emotional distress damages are available for automatic stay violations. *In re Repine*, 536 F.3d 512, 521 (5th Cir. 2008); *see* Pet. App. at 125-27.

The Fifth Circuit, similarly, appears to have presumed that emotional distress damages may be available, but has not had occasion to elaborate on the appropriate standards other than to say at a minimum it likely would require "specific information." *See Repine*, 536 F.3d at 522 ("[The] 'specific information' requirement is a threshold requirement . . . we need not adopt a precise standard for whether, or under what circumstances, a court may award

emotional damages under § 362([h]) because we find that Repine has not made this minimal showing").

II. Bankruptcy Case Filings are Increasing and Emotional Distress Stay Litigation is Extensive and Proliferating Rapidly.

If emotional distress damages are actual damages within the scope of Section 362(h), an award *must be made* when an individual is injured by a willful violation of the stay. 11 U.S.C. § 362(h) ("[An] individual injured by any willful violation . . . *shall recover* actual damages. . . ."); *Budget Serv. Co. v. Better Homes*, 804 F.2d 289, 292 (4th Cir. 1986) (mandatory to award compensatory damages and attorneys' fees). The circuit courts have uniformly held that a "willful violation" does not require a specific intent to violate the stay, but simply knowledge of the bankruptcy and intentional action, with good faith simply irrelevant. *See Fleet*, 196 F.3d at 268-69 (citing cases from the Second, Third and Ninth Circuits); *Price v. United States*, 42 F.3d 1068, 1071 (7th Cir. 1994) ("A 'willful violation' does not require a specific intent to violate the automatic stay."); *Citizens Bank v. Strumpf*, 37 F.3d 155, 159 (4th Cir. 1994) ("To constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay."), *rev'd on other grounds*, 516 U.S. 16 (1995).

Thus, in this case and numerous cases, damages are awarded under Section 362(h) when the creditor

proceeds with a good faith dispute over stay applicability (*e.g., Fleet*, 196 F.3d at 267), makes an inadvertent mistake (*e.g., Torres*, 432 F.3d at 21; *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1543-44 (11th Cir. 1996)), or there is simply a computerized process underway that is infeasible to stop quickly, such as a computer freeze of a tax refund withholding or social security offset (*e.g., In re Griffin*, 415 B.R. 64, 65 (Bankr. N.D.N.Y. 2009); *Price*, 42 F.3d at 1070). Indeed, the Fifth Circuit has ruled that a creditor taking action on property that is even "arguably" property of the estate violates Section 362(a)(3) and is liable for Section 362(h) damages even if there is a good faith dispute over ownership and the creditor turns out to be correct.[4] *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 304 (5th Cir. 2005).

Such stay violations are endemic because bankruptcy filings are numerous and escalating with foreclosures and job losses in the economic downturn of the last few years. There were 1.4 million bankruptcy case filings in 2009, a 32 percent increase over 2008 that amounted to 1 in every 80 households. National Bankruptcy Research Center, December 2009 Bankruptcy Filings Report, *available at* http://www.nbkrc.

---

[4] Petitioner is not asking this Court to grant review on the standard for willfulness, on which the circuits thus far have not disagreed. The point is that automatic stay damages claims are quite common in light of the generous nature of the willfulness standard, and thus the extant Circuit split is especially pernicious.

com/December2009_News.aspx. In the first quarter of 2010, bankruptcy filings increased 18 percent over the same quarter in 2009. National Bankruptcy Research Center, March 2010 Bankruptcy Filings Report, *available at* http://www.nbkrc.com/March2010_News.aspx. In this difficult economic climate, it can be anticipated that the already very substantial volume of cases seeking emotional distress damages for violations of the automatic stay (*see* Pet. App. 102-27) will increase markedly.

In part this is due to the fact that the standard for recovery of emotional distress damages set by the Ninth Circuit is not a difficult one for debtors to satisfy. No evidence of medical treatment or mental therapy is necessary to justify an emotional distress award, just a debtor's tearful testimony. Hence, stay violation damages cases are becoming an increasingly common source of money for debtors and their attorneys, who might consider themselves derelict toward their clients if they fail to demand compensation for virtually any stay violation. Damages awards are not infrequently in the thousands of dollars, and litigation time, attention and fees must be borne by financial institutions, governmental bodies and other creditors responding to such claims.

As of this writing, petitioners count 109 bankruptcy and district court reported opinions attempting to come to grips with emotional damages claims under Section 362(h). This is likely the tip of the iceberg, with many more unreported decisions, and creditor settlements to avoid risking larger awards.

Federal statutes should be interpreted uniformly across the country, without variance by circuit. The circuit split is creating substantive inconsistency in the rule of law applied by federal bankruptcy courts, however. They are currently lining up behind *Aiello* or *Dawson II* and *Fleet Mortgage*. Roughly half the courts believe it is appropriate to hear debtors' testimony about their feelings arising from creditor actions and award emotional distress damages, and half refuse to award such damages or award only nominal damages, and there are discrepancies within circuits and within districts. A chart summarizing the disparate case law is attached as Pet. App. 102-27. In some parts of the United States, debtors are awarded such damages and creditors acting in good faith must pay them, and in some parts of this country, the opposite is true. Thus, without intervention by the Court, the availability of emotional distress damages will continue to turn solely on the happenstance of where the bankruptcy court sits.

Bankruptcy judges know that there is a trend of debtors using Section 362(h) "as a sword rather than a shield, to courts' dismay," and that "rewarding debtors too lavishly in § 362(h) actions will encourage a cottage industry of precipitous § 362(h) litigation." *Roman*, 283 B.R. at 11-12. At least one internet website touts certain attorneys as "Your Stay & Discharge Order Violation Resource and Referral Source," invites general bankruptcy attorneys to "email your referrals to us," and boasts about damages award or

settlements secured in such litigation on behalf of past clients. *See www.StayViolation.com.*

The proliferation of automatic stay damages litigation also affects the public fisc. In 2004, the United States filed an amicus brief in the Ninth Circuit on the issue presented here, and took the position that, as a matter of statutory interpretation, emotional distress damages are not authorized under Section 362(h). In that brief, the United States noted that allowing emotional distress damages has a considerable public economic impact, because the United States is a frequent respondent in automatic stay violation claims and thus has an interest in ensuring damages are limited only to those authorized by Congress. *See* Brief for the United States as *Amicus Curiae*, 2004 WL 545822, filed in *Stinson v. Cook Perkiss & Lew (In re Stinson)*, 128 Fed. Appx. 30, 2005 WL 736668 (9th Cir. Apr. 1, 2005). Indeed, the Ninth Circuit denied rehearing *en banc* in *Dawson II* after the United States advised the court that "it supports the petition for rehearing en banc" and "the Solicitor General has authorized the filing of an amicus brief supporting the Appellee if the Court grants rehearing en banc." Pet. App. 97. This history demonstrates the importance of the issue not only to the parties and private litigants but also to the United States.

III. Actual Damages Under Section 362(h) Do Not Include Emotional Distress Damages.

A. The Statutory Language Does Not Support Emotional Distress Damages.

In 1939, this Court interpreted "actual damage" as used in the Bankruptcy Act to mean "only those damages susceptible of definite proof" with "evidence [that] must show damages to reasonable certainty." *Conn. Ry. & Lighting Co. v. Palmer*, 305 U.S. 493, 502, 505 (1939) (interpreting Bankruptcy Act § 77 regarding lease rejection damages). "Definite proof" and "reasonable certainty" are problematic when it comes to emotional distress. The Restatement of Torts recognizes that because intensity, duration and other factors in considering emotional distress are all indefinite, "it is impossible to require anything approximating certainty of amount even as to past harm." Restatement (Second) of Torts § 912, cmt. b (1977).

The Bankruptcy Code concerns and adjusts economic relationships among debtors and creditors. Damages awards under statutes protecting property or financial interests such as the Securities Acts and Copyright Act have been held limited to economic losses. *See Ryan*, 556 F.2d at 464 (interpreting Securities Act 15 U.S.C. § 78bb(a) to preclude mental suffering damages: "Actual damages mean some form of economic loss."); *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (Copyright Act phrase "actual damages" means only financial losses), *cert. denied*, 537 U.S. 1189, 123 S. Ct. 1259 (2003). In contrast, statutes that have been interpreted to encompass

emotional distress damages are civil rights laws and other statutes enacted for the fundamental purpose of protecting human dignity, encompassing reputational and mental well-being. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (§ 1983); *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (Civil Rights Act of 1871); *Banai v. Secretary, HUD*, 102 F.3d 1203, 1207 (11th Cir. 1997) (Fair Housing Act). The Bankruptcy Code is not a human rights or consumer protection statute.

B. The Historical Context of Section 362(h) Is Inconsistent With Emotional Distress Damages.

Section 362(h) was enacted to provide a statutory remedy for automatic stay violations that were historically handled through contempt actions, when the jurisdictional ability of bankruptcy courts to order contempt was questioned. It was not enacted to assuage the emotional distress of bankrupt debtors, or to change the historical absence of emotional distress damages in contempt proceedings.

The automatic stay is about preventing creditors from collecting from the bankruptcy estate, thereby preserving the bankruptcy *res* for fair and equitable distribution to all creditors and giving the debtor a reprieve to reorganize or move on from discharged debts with a fresh start. When this stay was made automatic in the Bankruptcy Reform Act of 1978, rather than being imposed by court order or general

order as under prior bankruptcy law, it continued to be enforced through contempt of court proceedings. *See In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104-05 (2d Cir. 1990); *Chesnut*, 422 F.3d at 301-02; 3 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY § 362.LH (15th rev. ed. 2009) (historical analysis of the automatic stay). Bankruptcy court authority to enter contempt orders became uncertain when this Court held the jurisdictional underpinning of the Bankruptcy Code to be unconstitutional in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

Congress enacted Section 362(h) in 1984 with the Bankruptcy Amendments and Federal Judgeship Act of 1984 in response to *Northern Pipeline*. *See* Pub. L. No. 98-353, § 304, 98 Stat. 352 (1984). While there is no direct legislative history of that particular provision, the historical context reflects that its primary purpose was simply to provide explicit statutory authorization to award damages as a remedy for a stay violation, rather than to provide consumer debtors with compensation for emotional harm. *See Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000) (Section 362(h) enacted "because reliance on the contempt power to remedy violations of § 362 had been widely criticized"); *Price v. Rochford*, 947 F.2d 829, 831 (7th Cir. 1991) (Section 362(h) enacted "[a]s part of the package" of Bankruptcy Code amendments to solve constitutional problems identified in *Northern Pipeline*).

When enacting Section 362(h) as the statutory replacement of an historical contempt remedy, Congress presumably knew that most courts had rejected emotional distress damages in contempt actions, including contempt of bankruptcy stay orders and rules. *See, e.g.*, cases reflecting this historical treatment: *McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992) ("The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings."); *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989) (award of emotional distress civil contempt damages for stay violation vacated as inappropriate).

There is no Congressional record of intent to create with Section 362(h) a cause of action not generally available at common law for torts associated with property rights or wrongful debt collection. Emotional distress was not compensable in such cases absent egregious conduct and intense mental distress. *See* W. E. Shipley, Note: *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R.2d 1070, 1077 (1953 & supplements); Joel E. Smith, Annotation, *Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R.3d 201, 205 (1978 & supplements); *Field v. Mans*, 516 U.S. 59, 69 (1995) (common law terms used in Bankruptcy Code "imply elements that the common law has defined them to include").

The Ninth Circuit ignored this history and context of Section 362(h). It justified its conclusion that "actual damages" includes compensation for emotional distress because Section 362(h) only applies to individuals. It interpreted the 1984 enactment of Section 363(h) by recourse to an FTC staff lawyer's personal statement (explicitly not speaking for the FTC) about debtor harassment in the legislative history of the 1978 Bankruptcy Code, six years before the enactment of Section 362(h). *Dawson II*, 390 F.3d at 1148. Congress provided a remedy for such harassment by making the stay automatic in 1978. It may well have referenced "individuals" when enacting Section 362(h) years later simply because it concluded that individuals warranted special protections given their common lack of awareness of their rights. *See Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183, 186 (2d Cir. 1990) (finding this to be the likely rationale for Section 362(h)'s limitation to individuals injured by willful stay violations).

Without any explicit indication in the Bankruptcy Code or its legislative history to change pre-Code law, Section 362(h) ought to be construed in accordance with such pre-Code civil contempt practice and boundaries of common law emotional distress damages. *See Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (interpret Code provisions consistently with pre-Code practice in absence of discussion of change in legislative history). Yet under *Dawson II* and this case, the opposite is true. Emotional distress damages

must be awarded as actual damages whenever the debtor testifies to feeling embarrassed and distressed to a degree the court finds significant and tied to the stay violation, even if there was no physical injury and the defendant acted in the utmost good faith – a sweeping change.

C. Allowing Recovery of Emotional Distress Damages Has Produced Wildly Inconsistent Outcomes.

In addition to the statute's language and historical development, numerous cases reflecting sharply inconsistent rulings weigh substantially against saddling bankruptcy courts with the duty to award emotional distress damages for violations of the automatic stay. For example:

- Emotional distress not proved: Debtor was "torn-up, shaken, and nervous the rest of the day as a result of the telephone calls, [but] there was no evidence that she sought medical relief or that the anxiety caused by [the creditor's] collection efforts rendered her incapable of going about her daily routine." *In re Skeen*, 248 B.R. 312, 318-19 (Bankr. E.D. Tenn. 2000), cited in *Dawson II*, 390 F.3d at 1149.

- Emotional distress proved: Debtor was "forced to cancel her son's birthday party, embarrassed in a check-out line at the supermarket and justifiably worried that her checks would bounce due to the freeze on her

account," despite the stay violation being "brief and not egregious." *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995), cited in *Dawson II*, 390 F.3d at 1150 and by the bankruptcy and district courts below. Pet. App. 47, 94-95.

- Damages for cancelled child's party and checkout line embarrassment: $5,000. *Flynn*, 185 B.R. at 93.

- Damages for decline in social invitations from neighbors that caused the debtor not to sleep or eat well: $25,000. *Fleet Mortg.*, 196 F.3d at 269-70.

- Damages for anxiety, insomnia and diagnosed depression after a creditor entered the debtor's home at night, doused the lights, and pretended to hold a gun to the debtor's head: $100. *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987), cited in *Dawson II*, 390 F.3d at 1150.

As noted in *Aiello*, claims of emotional distress are easy to manufacture. *Aiello*, 239 F.3d at 880. Emotional distress is not only fraught with vagueness and subjectivity, but also easily susceptible to fictitious and trivial claims that are blown out of reasonable proportion. The line between fleeting and trivial versus substantial distress is in the eye of the beholder. Although courts say clear evidence of a significant harm is required, this case is not unusual, with minimal economic losses dwarfed by an emotional damages award that is supported only by the

debtor's recounting of his sleeplessness, embarrassment and unhappiness.

* * *

There is a square conflict between the law of the Ninth and Seventh Circuits on whether emotional distress constitutes the "injury" contemplated or whether "actual damages" mandatorily awarded for such injury includes compensation for emotional distress that cannot be objectively valued, in order to redress willful (but in truth often unintentional) automatic stay violations in individual cases. It is a conflict that cries for resolution now, given the extent of bankruptcy litigation over the issue and the trend of awarding debtors thousands of dollars whenever they testify to their emotional reactions to inevitable computer glitches and good faith disputes over the stay, despite minimal or no pecuniary losses. This case provides an ideal opportunity for resolution of the federal issue on which the Circuits are divided.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 North Central Ave.
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@LRLaw.com

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965

Counsel for Petitioner

DONALD B. AYER
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-4689

Co-Counsel for Petitioner

595 F.3d 937

United States Court of Appeals,
Ninth Circuit.
Melvin STERNBERG; Sternberg & Singer, Ltd.,
Appellants,
v.
Logan T. JOHNSTON, III, Appellee.
Nos. 07-16870, 08-15721.

Argued and Submitted March 6, 2009.
Filed Oct. 1, 2009.
As Amended Oct. 22, 2009.
Second Amendment Feb. 8, 2010.

Michael W. Carmel, Phoenix, AR, for the appellants.

Ronald J. Ellett, Phoenix, AR, for the appellee.

Appeal from the United States District Court for the District of Arizona, Roslyn O. Silver, District Judge, Presiding. D.C. No. 2:06-CV-02115-ROS.

Before: MICHAEL DALY HAWKINS, MARSHA S. BERZON, and RICHARD R. CLIFTON, Circuit Judges.

ORDER

The opinion in this case is further amended by adding a new footnote 3 (and renumbering succeeding footnotes) on page 14188 of the amended slip opinion filed on October 22, 2009 (also found at 582 F.3d 1114, 1122), at the end of the first sentence of the fourth paragraph under the hearing "B. Attorney Fees," which reads:

> The relevant statute, 11 U.S.C. § 362(k)(1), states that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

The new footnote 3 added at the end of that sentence is:

> The attorneys fee award against Sternberg was based on the authority of this statute. The bankruptcy court did not find Sternberg or anyone else to be in civil contempt for violating the automatic stay, nor did it impose any sanctions under its inherent civil contempt authority. *See In re Dyer*, 322 F.3d 1178, 1189 (9th Cir.2003). As this opinion does not consider the civil contempt authority of the court, it does not limit the availability of contempt sanctions, including attorney fees, for violation of the automatic stay, where otherwise appropriate.

With this amendment, the panel has voted to deny the petition for panel rehearing. Judges Berzon and Clifton vote to deny the petition for rehearing en banc and Judge Hawkins so recommends. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R.App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are denied. No subsequent petitions for rehearing, rehearing en banc, or rehearing before the full court may be filed.

OPINION

CLIFTON, Circuit Judge:

The filing of a bankruptcy petition immediately gives rise to an automatic stay. The stay applies to block or freeze most judicial actions against a debtor. It also permits a debtor to recoup any "actual damages," including attorney fees, that result from a willful stay violation. *See* 11 U.S.C. § 362. This case presents questions both as to when a willful stay violation occurs and as to what attorney fees may be recovered as "actual damages."

We affirm the holding of the district court that appellant Melvin Sternberg willfully violated the automatic stay that arose once appellee Logan Johnston filed for bankruptcy. Our cases establish that Sternberg had an affirmative duty to comply with the stay. This duty included ensuring that his actions did not prolong a violation of the stay that resulted from a state court motion seeking relief against Johnston that Sternberg filed prior to the bankruptcy. In this case, Sternberg willfully violated the automatic stay by defending an overbroad state court order in its entirety.

We also hold, however, that Johnston can recover as actual damages only those attorney fees related to enforcing the automatic stay and remedying the stay violation, not the fees incurred in prosecuting the bankruptcy adversary proceeding in which he pursued his claim for those damages. We thus vacate the amount of the award entered by the district court and remand for determination of the appropriate amount.

I. Background

Logan Johnston and Paula Parker were divorced in 1996. As part of the property settlement, Johnston was ordered to pay spousal maintenance.

In January 2001, Parker, through her attorney, Melvin Sternberg, asked the state court to hold Johnston in contempt for non-payment of spousal support. Among other things, the request asked the court to "award Judgment . . . for all sums of spousal maintenance[;] . . . enter an Order that [Johnston] be incarcerated; that his professional law license be suspended; and his drivers' license be revoked . . . until he . . . immediately pay[s] *ALL* sums[;]" and place a lien "upon any vehicle or other property owned."

On May 14 of that year, Johnston filed a Chapter 11 bankruptcy petition. His bankruptcy counsel did not file notice of this petition in the state court proceeding until May 17, however.

On that same day, May 17, the state court conducted what appears to have been a previously scheduled evidentiary hearing on Parker's contempt request. Johnston, who is an attorney, represented himself. Approximately 15 minutes into the hearing, he advised the court for the first time of his bankruptcy proceedings, explaining that the proceedings would result in a plan to pay his debts, including the spousal support, and that his bankruptcy counsel had informed him that the filing of the bankruptcy petition stayed anything regarding the property settlement, attorney fees, and sanctions. He apologized for "not knowing exactly what's going on" and

said, "I guess, I object in the abstract to anything that would contravene the bankruptcy laws," while agreeing that the state court could establish the amount of his arrears.

Sternberg, for his part, explained that he did not know if the bankruptcy filing stayed the proceedings but stated that he did not think moving forward on the arrears, attorney fees, and contempt determination would violate the stay. The court decided to proceed on the issue of whether Johnston was in contempt. It would "take up the issue of sanctions at a later time when counsel ha[d] researched whether or not [the] court has jurisdiction to issue sanctions when a bankruptcy proceeding is pending."

On July 13, the state court filed a minute order holding Johnston in violation of the divorce decree. The court found Johnston in contempt and granted judgment for Parker in the amount of $87,525.60, including interest. In addition, it ordered Johnston to "pay the judgment by August 1, 2001," or be jailed "until the full amount . . . is paid."

The parties were surprised by the order. Specifically, the bankruptcy court found that Sternberg and Parker "had expected further proceedings before the Judge would order [Johnston] to pay a sum certain or face any consequences."

Johnston quickly sought to obtain relief from the order. He filed a motion for stay in the state court, but the hearing date on that motion was set for the day after the August 1 deadline by which he was to

pay the arrears or go to jail. Additionally, he wrote a letter to Sternberg informing him that he was in violation of the automatic stay and asking Sternberg to "take appropriate remedial measures to cure [his] violation." Sternberg did not take such action.

Johnston then filed a petition in the Arizona court of appeals, requesting the appellate court to stay and vacate the order. Representing Parker, Sternberg's law firm filed a responsive brief, which was signed by another lawyer on Sternberg's behalf. The brief took the position that the state court had proceeded within two exemptions to the automatic stay. Those exemptions allow for "the establishment or modification of an order for domestic support obligations" and "the collection of a domestic support obligation from property that is not property of the estate." 11 U.S.C. § 362(b)(2)(A)-(B). The brief concluded by arguing that the judge "properly exercised her broad discretion and legal authority to continue with the evidentiary hearing[,] . . . [to] hold Petitioner in contempt[,]" and to "deny [his] motion for relief."

In the meantime, Johnston also sought relief from the bankruptcy court, where he filed another emergency motion to set aside the minute order, and also an adversary proceeding charging Parker and Sternberg with willfully violating the automatic stay. On July 31, the bankruptcy court conducted a hearing on the emergency motion. It concluded that the automatic stay had been violated and vacated the state court's minute order. In a later order, the bankruptcy court summarized its decision as follows:

> If the State Court had qualified its Order to reflect only the amount of the arrearages, or if the State Court had been advised of what constituted non-estate property, so that the Minute Entry Order could be tailored only to the collection of the arrearages from such non-estate property, then the State Court arguably would have been acting within an exception to the automatic stay. However, the Minute Entry dictated that the Debtor immediately satisfy a large Judgment or face incarceration; all without the State Court focusing on the non-estate property . . . or requesting the Bankruptcy Court's prior determination of whether the automatic stay applied. . . .

Johnston v. Parker (*In re Johnston*), 308 B.R. 469, 474 (Bankr.D.Ariz.2003) ("*Johnston I*").

Some time later, the adversary proceeding went to trial. After Johnston presented his case, Parker and Sternberg moved for a directed verdict. *Id.* at 471. The bankruptcy court granted the motion. *Id.* at 484-85. While the court reaffirmed its earlier conclusion that the state court order had violated the automatic stay, it wrote that it "[did] not see any separate violation of the stay by Defendants Parker and Sternberg." *Id.* at 478. Furthermore, the court noted that while *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir.2002), a precedent imposing an affirmative duty on parties to dismiss or stay actions that violate the stay, *id.* at 1214-15, could be interpreted as "chang[ing] this result," the court believed

that case "should be limited to post-petition collection actions commenced or maintained by a creditor or its law firm' and not a claim for "support arrearages." *Johnston I*, 308 B.R. at 483-84.

On appeal, the district court reversed, holding *Eskanos* to be controlling. *Johnston v. Parker* (*In re Johnston*), 321 B.R. 262, 282 (D.Ariz.2005) ("*Johnston II*"). More specifically, the court held, under *Eskanos*, that Sternberg and Parker "had an obligation to remedy the violation" of the stay created by the state court order and found no grounds by which to distinguish *Eskanos*. *Id.* at 284-86. It remanded the case to the bankruptcy court for further proceedings. *Id.* at 287.

The remanded issues were then tried to the bankruptcy court. Before the court issued a ruling, Johnston settled with Parker, leaving only Sternberg as a defendant.

The bankruptcy court filed its decision in March 2006. The court explained that the district court's opinion had narrowed the issues because it had concluded that "Sternberg willfully violated the automatic stay." After hearing Johnston's testimony and reviewing his monthly interim reports, the court concluded that Johnston had been injured in the amount of $2,883.20 because the stay violation had hindered his ability to work. The court also found Johnston's testimony of emotional distress to be credible and awarded further damages in the amount of $20,000. Lastly, the court conducted a review of

Johnston's attorney fees and costs, and awarded $69,986, which included fees for prosecuting the adversary proceeding. The total judgment amounted to $92,869.20 plus post-judgment interest at a rate of 5.10% per annum.

An appeal followed, and the district court affirmed. Sternberg then appealed to our court.

II. Discussion

This opinion addresses two issues: whether Sternberg violated the automatic stay and whether the bankruptcy court erred in its calculation of Johnston's damages.[1] Each issue is addressed in turn.[2]

---

[1] While Sternberg also argues that the bankruptcy court's emotional distress award was an abuse of discretion, this issue does not merit a lengthy discussion. Each of Sternberg's arguments is foreclosed by *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139 (9th Cir.2004). First, as *In re Dawson* clearly states, "even if the violation of the automatic stay was not egregious," Johnston could recover emotional distress damages that arose from a stay violation. *Id.* at 1149-50. Second, Johnston could establish emotional distress damages without corroborating evidence if the circumstances make it obvious "that a reasonable person would [have] suffer[ed] significant emotional harm," which the bankruptcy court found was the case here. *Id.* at 1149-51. Lastly, there is no basis on which to disturb the bankruptcy court's finding that Johnston did not waive his emotional distress claim or to find that his claim was somehow precluded by the bankruptcy court's evidentiary rulings.

[2] Johnston argues that Sternberg has waived all of his arguments but one by providing an inadequate "appellate

(Continued on following page)

A. The Automatic Stay

Whether the automatic stay has been violated is an issue we review *de novo. Eskanos,* 309 F.3d at 1213. "Whether a party has willfully violated the automatic stay is a question of fact reviewed for clear error." *Id.*

When a debtor files for bankruptcy, he is immediately protected by an automatic stay under 11 U.S.C. § 362(a), which provides that a bankruptcy petition, among other things,

> "operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . ; the enforcement . . . of a judgment . . . ; any act to obtain possession of property of the estate . . . ; [and] any act to create, perfect, or enforce any lien. . . ."

It does not, however, prevent "the commencement or continuation of a civil action . . . for the establishment or modification of an order for domestic support obligations" or "the collection of a domestic support obligation from property that is not property of the estate." 11 U.S.C. § 362(b)(2)(A)-(B). Nevertheless, "[t]he scope of protections embodied in the automatic stay is quite broad, and serves as one of the most

---

record." Sternberg supplemented his excerpts of record, however, making it sufficient to resolve this dispute. *See Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1217-18 (9th Cir.1994).

important protections in bankruptcy law." *Eskanos*, 309 F.3d at 1214; *see Stringer v. Huet* (*In re Stringer*), 847 F.2d 549, 552 (9th Cir.1988) ("Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly. . . .").

We have held on several occasions that the automatic stay imposes on non-debtor parties an affirmative duty of compliance. In *State of California Employment Development Department v. Taxel* (*In re Del Mission Ltd.*), for example, we held that a state's knowing retention of disputed taxes violated the automatic stay. 98 F.3d 1147, 1151-52 (9th Cir.1996). We explained that "the onus to return estate property is placed upon the possessor; it does not fall on the debtor to pursue the possessor." *Id.* at 1151. Similarly, in *Knupfer v. Lindblade* (*In re Dyer*), we held that the post-bankruptcy petition recordation of a deed of trust by a creditor was a willful violation of the automatic stay because the creditor "had an affirmative duty to remedy his automatic stay violation . . . such as by attempting to undo the recordation process." 322 F.3d 1178, 1191-92 (9th Cir.2003).

The district court in this case found the rationale of our decision in *Eskanos* controlling. In that case, a law firm had been hired by one of a debtor's unsecured creditors to pursue a collection action against the debtor. After filing the action, the firm learned of the debtor's bankruptcy but waited 23 days to dismiss the action. *Eskanos*, 309 F.3d. at 1212. The bankruptcy court found that this inaction violated the

automatic stay, and the district court agreed. *Id.* at 1212-13. On appeal, we explained that the plain language of § 362(a)(1) unambiguously imposed an "affirmative duty" on the firm to discontinue the action once it gained knowledge of the bankruptcy. *Id.* at 1214-15. "Maintenance of an active collection action in state court does nothing if not carry forward or persist against a debtor. . . . [S]tate filings exist as more than placeholders-the risk of default judgment looms over the debtor throughout." *Id.* at 1214. Since the law firm allowed the collection action to persist even after learning of the debtor's bankruptcy, we affirmed. *Id.* at 1214-16.

The above authorities establish that Sternberg had an "affirmative duty" to conform his conduct to the automatic stay once Johnston filed for bankruptcy. The district court found that Sternberg violated this duty because he "w[as] required to take affirmative action to stay or vacate the state court's . . . Order" and failed to do so. *Johnston II,* 321 B.R. at 286.

We do not fault Sternberg for anything he did at the May 17 state court hearing, because the news of Johnston's bankruptcy filing came as a surprise to him. The state court's July 13 order also surprised him, and Sternberg cannot be held responsible for the order. Within a reasonable time after that, however, the law required Sternberg to take corrective action. He did not, and he affirmatively opposed Johnston's effort to obtain relief from the state appellate court.

As described above, shortly after the overbroad state court order was filed, Johnston brought a petition for special action requesting the state appellate court to stay and vacate the order. In response, Sternberg offered a complete defense of the order. The conclusion of the brief filed by Sternberg's law firm on behalf of Parker illustrates the breadth of this defense. The brief concludes by arguing that the state court judge "properly exercised her broad discretion and legal authority to continue with the evidentiary hearing[,] . . . hold [Johnston] in contempt[,]" and "deny [his] motion for relief." Sternberg's defense of the order was absolute. He did not try to parse the valid from the invalid, but instead defended the order in its entirety, including the command that Johnston pay the arrears or go to jail, and without limiting the source of payment to non-estate property.

Sternberg argues that he was "compelled" to do this because the order was not completely invalid and Johnston had requested that it be vacated in its entirety. This misses the point. What Sternberg was compelled to do was comply with the automatic stay. *See, e.g., Eskanos,* 309 F.3d at 1212-14. The state court order was in violation of the stay because, as the courts below concluded, it ordered Johnston to pay arrears or go to jail without focusing on Johnston's non-estate property. *See Johnston II,* 321 B.R. at 275-80; *Johnston I,* 308 B.R. at 478, 480; *see also* 11 U.S.C. § 362. Sternberg recognized this but did not say anything to the appellate court because he did not think it was his duty "to practice law on

[Johnston's] behalf." That did not, however, authorize him to act in violation of the automatic stay.

To comply with his "affirmative duty" under the automatic stay, Sternberg needed to do what he could to relieve the violation. He could not simply rely on the normal adversarial process. *See Johnston Envtl. Corp. v. Knight* (*In re Goodman*), 991 F.2d 613, 615-16 (9th Cir.1993) (holding that parties who attempted to exempt a debtor from their unlawful detainer action with a unilateral stipulation still violated the automatic stay because "the stipulation might not [have] accomplish[ed] its intended purpose" and thus the parties "could have, and should have, pursued the orthodox remedy: relief from the automatic stay"). At a minimum, he had an obligation to alert the state appellate court to the conflicts between the order and the automatic stay. As we have explained before, "[t]he automatic stay is intended to give the debtor a breathing spell from his creditors." *Goichman v. Bloom* (*In re Bloom*), 875 F.2d 224, 226 (9th Cir.1989) (internal quotation marks omitted). The state court order intruded upon Johnston's "breathing spell." Sternberg did not act to try to fix that problem.

Sternberg also argues a variety of facts that implicitly challenge the willfulness of his violation. The thrust of his argument is that because Johnston never specifically requested that Sternberg seek to modify the order, and because Sternberg never sought to collect on the order, Sternberg did not willfully violate the stay. Sternberg also appears to argue that because he believed that he was always proceeding

within the domestic support exemptions, he could not have committed a willful violation.

Johnston was not required to ask Sternberg to modify the order for Sternberg's violation to be willful. *See In re Del Mission Ltd.*, 98 F.3d at 1151-52 (concluding that the retention of taxes was a violation of the stay even though the debtor never requested their return). Likewise, Sternberg needed neither to make some collection effort nor to know that his actions were unlawful for his violation to be willful. *See Eskanos,* 309 F.3d at 1214-15 (rejecting the law firm's assertion that something more than maintaining an active collection action was needed to violate the stay); *In re Goodman,* 991 F.2d at 618 ("Whether the [defendant] believes in good faith that it had a right to the property is not relevant to whether the act was 'willful'. . . ." (internal quotation marks omitted)). All that is required is that Sternberg "knew of the automatic stay, and [his] actions in violation of the stay were intentional." *Eskanos,* 309 F.3d at 1215. Both of these elements were satisfied here.

At a minimum, Sternberg needed to alert the appellate court to the obvious conflicts between the order and the stay. By not doing so, he willfully violated the automatic stay.

B. Attorney Fees

Sternberg also argues that the bankruptcy court erred in calculating Johnston's damages because it

awarded attorney fees not only for the work associated with remedying the stay violation but also for the subsequent adversary proceeding in which Johnston sought to collect damages for the stay violation. We agree.

"A bankruptcy court's award of attorney fees is reviewed for abuse of discretion or erroneous application of the law." *Dawson v. Washington Mutual Bank, F.A.* (*In re Dawson*), 390 F.3d 1139, 1145 (9th Cir.2004).

Congress legislates against the backdrop of the "American Rule." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). "Unlike Britain where counsel fees are regularly awarded to the prevailing party, it is the general rule in this country that unless Congress provides otherwise, parties are to bear their own attorney's fees." *Id.* We interpret possible fee-shifting statutes in light of their context and the goals underlying the legislation of which they are a part. *See Fulfillment Services Inc. v. United Parcel Service, Inc.*, 528 F.3d 614, 623 (9th Cir.2008).

The relevant statute, 11 U.S.C. § 362(k)(1), states that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[3] Without a

---

[3] The attorneys fee award against Sternberg was based on the authority of this statute. The bankruptcy court did not find

(Continued on following page)

doubt, Congress intended § 362(k)(1) to permit recovery as damages of fees incurred to prevent violation of the automatic stay. In permitting recovery of these fees as damages, § 362(k)(1) is consistent with the American Rule. There are several other situations in which fees can be part of damages; i.e., where the harm to be remedied includes expenditure of fees. Examples include legal malpractice suits, *see, e.g., John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528 (Tenn.1998) (holding that a successful plaintiff in a legal malpractice action may recover "initial fees a plaintiff pays or agrees to pay an attorney for legal services that were negligently performed" and "corrective fees incurred by the plaintiff for work performed to correct the problem caused by the negligent lawyer" but *not* "litigation fees, which are legal fees paid by the plaintiff to prosecute the malpractice action against the offending lawyer") (internal quotations omitted); bad faith actions against an insurer, *see Brandt v. Superior Court*, 37 Cal.3d 813, 210 Cal.Rptr. 211, 693 P.2d 796 (Cal.1985) ("When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows

---

Sternberg or anyone else to be in civil contempt for violating the automatic stay, nor did it impose any sanctions under its inherent civil contempt authority. *See In re Dyer*, 322 F.3d 1178, 1189 (9th Cir.2003). As this opinion does not consider the civil contempt authority of the court, it does not limit the availability of contempt sanctions, including attorney fees, for violation of the automatic stay, where otherwise appropriate.

that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss-damages-proximately caused by the tort. These fees must be distinguished from recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad faith action itself.") (internal citations omitted); and abuse of process suits, *see, e.g., Technical Computer Servs., Inc. v. Buckley,* 844 P.2d 1249 (Colo.Ct.App.1992) (recognizing the "general rule" that "a claimant in a malicious prosecution or abuse of process action can recover attorney fees incurred in defending against the prior wrongful litigation" but "cannot recover attorney fees incurred in bringing the malicious prosecution or abuse of process action itself," and applying the same rule where "the abuse of process claim is brought as a counterclaim to wrongful litigation rather than as a later separate action").

What is less clear is whether Congress intended to deviate from the American Rule by allowing recovery as damages of the fees incurred in the bankruptcy court action for damages resulting from violation of the automatic stay.[4]

---

[4] We have affirmed awards under § 362(k)(1) that appear to have contained attorney fees incurred in prosecuting a § 362(k)(1) damages action. *See In re Dawson,* 390 F.3d at 1152-53; *In re Bloom,* 875 F.2d at 227; *see also Havelock v. Taxel (In re Pace),* 67 F.3d 187, 192 (9th Cir.1995) (describing *In re Bloom* as "approving an award of fees that included the cost of prosecuting the action for damages stemming from violation of the automatic stay"). In these cases our court was not confronted with an

(Continued on following page)

We have previously stated that § 362(k)(1) "mandates the award of actual damages to an individual injured by any willful violation of a stay." *In re Del Mission Ltd.*, 98 F.3d at 1152 (internal quotation marks and alterations omitted). But "actual damages" is an ambiguous phrase. *See In re Dawson*, 390 F.3d at 1146 (noting that "the text of the statute" does not define "actual damages"). The Bankruptcy Appellate Panel ("BAP"), for example, seems to view "actual damages" as requiring an award that returns a debtor to the position he was in before the stay violation occurred. *See Beard v. Walsh* (*In re Walsh*), 219 B.R. 873, 878 (9th Cir. BAP 1998) (rejecting an alternative reading of the statute under which, according to the BAP, "the injured party is not made whole"). Thus, in *In re Pace*, the BAP stated:

> An award of attorneys' fees is appropriate where a debtor must resort to the Court to enforce his or her rights in consequence of a violation of the automatic stay. Accordingly, it is well established that the attorneys' fees and costs incurred in prosecuting an adversary proceeding seeking damages arising from a violation of the automatic stay is recoverable. . . .

---

argument that § 362(k)(1) does not permit such fees. "In [none of the] case[s], then, was the issue we face today 'presented for review' and decided. Accordingly, we are free to decide the issue without referring it to the court en banc." *United States v. Macias-Valencia*, 510 F.3d 1012, 1015 (9th Cir.2007) (internal citation omitted).

Havelock v. Taxel (*In re Pace*), 159 B.R. 890, 900 (BAP 9th Cir. 1993) (internal quotation marks and citation omitted), *vacated in part on other grounds by* 67 F.3d 187 (9th Cir.1995).

In contrast, we conclude that the plain meaning of "actual damages" points to a different result. The dictionary defines "actual damages" as "[a]n amount awarded . . . to compensate for a proven injury or loss; damages that repay actual losses." BLACK'S LAW DICTIONARY 416 (8th ed.2004). Following this definition, the proven injury is the injury resulting from the stay violation itself. Once the violation has ended, any fees the debtor incurs after that point in pursuit of a damage award would not be to compensate for "actual damages" under § 362(k)(1). Under the American Rule, a plaintiff cannot ordinarily recover attorney fees spent to correct a legal injury as part of his damages, even though it could be said he is not made whole as a result. *See, e.g.*, Restatement (Second) of Torts § 914(1) (1979) ("The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation."). The same is true here. The context and goals of the automatic stay support this narrower understanding, and it is the one we adopt.

We have explained the purposes of the automatic stay as twofold. These two purposes are enabling the debtor to try to reorganize during a break from collection efforts and protecting creditors by preventing one creditor from pursuing its own remedies

to the detriment of its co-creditors. *See In re Dawson*, 390 F.3d at 1147 (citing *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir.1993)). *In re Dawson* took this analysis a step further. There, we reasoned that the twofold purpose showed that "the stay . . . is meant to achieve financial *and* non-financial goals." *Id.* We explained that "one aim of the automatic stay is financial[, as] the stay gives the debtor time to put finances back in order, . . . [b]ut another purpose is to create a breathing spell" for a debtor from his creditors. *Id.* (internal quotation marks omitted).

Permitting a debtor to collect attorney fees incurred in prosecuting a damages action would further neither the financial nor the non-financial goals of the automatic stay. With regard to the financial goals, we have explained that "the stay gives the debtor time to put finances back in order, offers the debtor an opportunity to reorganize so that creditors can be satisfied to the greatest extent possible, and prevents creditors from racing to devour the debtor's estate. . . ." *Id.* The stay, then, is meant to help the debtor deal with his bankruptcy for the benefit of himself and his creditors alike. We have never said the stay should aid the debtor in pursuing his creditors, even those creditors who violate the stay. The stay is a shield, not a sword. *See, e.g., Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir.1993) ("It is designed to effect an immediate freeze of the *status quo* by precluding and

nullifying post-petition actions . . . in nonbankruptcy fora against the debtor. . . .").

Allowing attorney fees for a damages action also would not promote the non-financial goals of the automatic stay. More litigation is hardly consistent with the concept of a "breathing spell" for the debtor. In fact, part of the rationale of the "affirmative duty" we have imposed on non-debtors to dismiss collection actions against debtors is that "[c]ounsel must be engaged to defend against a default judgment [and] . . . state collection actions are not to be used as leverage in negotiating . . . in bankruptcy." *Eskanos*, 309 F.3d at 1214. There is no reason to think that we should approve these possibilities when they could work to the debtor's advantage. Either way, he is engaged in litigation attenuated from the actual bankruptcy, something we do not think Congress intended to promote by allowing him to collect "actual damages" for a violation of the automatic stay. *See Fogerty*, 510 U.S. at 534, 114 S.Ct. 1023 ("Such a bold departure from traditional practice would have surely drawn more explicit statutory language. . . ."); *Fulfillment Services*, 528 F.3d at 624 ("While imposition of the British Rule would be far from [an] 'absurd result' . . . [,] [h]ad Congress aspired to such a radical departure, it no doubt would have so indicated with explicit language to that effect."). We conclude, therefore, that a damages action for a stay violation is akin to an ordinary damages action, for which attorney fees are not available under the American Rule.

We recognize that the Fifth Circuit appears to have held to the contrary: "The lower courts in our Circuit have concluded that it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim[,]" and "[w]e adopt the same reading of section 362(k) and therefore agree." *Young v. Repine (In re Repine)*, 536 F.3d 512, 522 (5th Cir.2008). We do not create a circuit split lightly. But the above-quoted language is all the court said on the issue. Without more, we are hard-pressed to find this decision persuasive.

We remand to the district court with instructions to remand to the bankruptcy court to determine which fees are properly allocable to efforts to enforce the automatic stay and prevent enforcement of the state court order that violated the stay. All fees related to proving Johnston's damages are disallowed per the American Rule.

III. Conclusion

We affirm that portion of the district court's judgment that holds that Sternberg violated the automatic stay and is liable for Johnston's actual damages. We also affirm the determinations that Johnston suffered actual damages of $2,883.20 for the interference with his work and an additional $20,000.00 for emotional distress. His actual damages also include the attorney fees incurred in seeking to enforce the automatic stay and to fix the problem caused by the overbroad state court order. Because

Johnston's actual damages under § 362(k)(1) do not include fees incurred in prosecuting the adversary proceeding to obtain damages, we vacate the amount of the judgment and remand for further proceedings to determine the appropriate amount.

Each side to bear its own costs.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re Logan T. Johnston III, Debtor	No. CV-06-2115-PHX-ROS **ORDER**
Melvin Sternberg, et al., Appellants, vs. Logan T. Johnston III, Appellee.	

Appellant Melvin Sternberg seeks review of a bankruptcy court Order dated August 10, 2006. For the following reasons, the Court affirms the bankruptcy court's Order.

I. Facts and Procedural History

In 1993, Logan T. Johnston III and Paula Parker filed for divorce.[1] Parker was awarded spousal maintenance in the amount of $4,000 per month for 24 months and $2,000 per month thereafter. On January 2, 2001, Parker and her lawyer Melvin Sternberg

[1] This is the second appeal to the district court in this case. The Order in the first appeal recounts the history of the case in great detail. *In re Johnston*, 321 B.R. 262 (D. Ariz. 2005). This opinion recites only the facts crucial to the Court's decision.

asked the Arizona Superior Court to hold Johnston in contempt for nonpayment of spousal support. On February 20, 2001, Johnston responded to the motion for contempt. The superior court held an evidentiary hearing on April 6, 2001. The court was unable to complete the hearing on that date and set another hearing for May 17, 2001. On May 14, 2001, Johnston filed a Chapter 11 petition. At the May 17, 2001 hearing Johnston informed the superior court that he had recently filed for bankruptcy. The parties and the court discussed the impact of the bankruptcy filing and the court stated a ruling would not be issued until it was assured that it had jurisdiction to do so in light of the bankruptcy petition. On July 13, 2001, the court filed a minute entry granting judgment to Parker in the amount of $87,525.60, supposedly the amount of support that Johnson had failed to pay. The minute entry ordered Johnston to pay the judgment by August 1, 2001 or face incarceration "for an indefinite period of time until the full amount of arrearages was paid in full."

After receiving the minute entry, Johnston's bankruptcy attorney sent a letter to the superior court asking that the minute entry be withdrawn because it constituted a violation of the bankruptcy automatic stay. Johnston's counsel also sent a letter to Sternberg asking that he take steps to cure the stay violation. Johnston's counsel later filed a petition for special action in the Arizona Court of Appeals seeking a stay of the minute entry. Sternberg filed a response to the petition, arguing that the superior

court's actions did not violate the automatic stay. On July 23, 2001, Johnston filed a "Complaint for Willful Stay Violation" in the bankruptcy court. Johnston's complaint alleged Sternberg, and others, refused to cure the stay violation. Johnston sought "his attorney's fees, his costs and such other relief as the Court deems just." On July 31, 2001, the Arizona Court of Appeals granted a temporary stay of the superior court's order. That same day the bankruptcy court found the minute entry violated the automatic stay and it vacated the minute entry. Sternberg filed a motion for reconsideration with the bankruptcy court but that motion was denied. The issues of the stay violation then proceeded to trial.

Prior to trial, as well as during the trial, the bankruptcy court excluded Johnston's evidence regarding emotional distress he suffered as a result of the stay violation. After Johnston presented his case, Sternberg moved for a directed verdict. The bankruptcy court granted the motion, finding there was "no basis to hold . . . Sternberg in violation or continuing violation of the stay." Johnston appealed that ruling to the district court. On appeal, the district court found that Sternberg's actions constituted a willful violation of the automatic stay. *In re Johnston*, 321 B.R. 262, 285 (D. Ariz. 2005). The district court remanded to the bankruptcy court to determine "the legal or factual merits" of Sternberg's defenses. The bankruptcy court was also tasked with determining an appropriate amount of damages.

On remand, the bankruptcy court concluded further proceedings. During those proceedings, the bankruptcy court heard testimony from Johnston that between July 16 and July 31, 2001 "he was distressed, upset, and unable to work efficiently because of the threat that he might be incarcerated on August 1, 2001." The bankruptcy court determined that Johnston's testimony regarding this "extreme distress . . . was credible and palpable." The bankruptcy court also heard evidence regarding the amount of attorneys' fees and costs Johnston incurred as a result of Sternberg's violation of stay. The bankruptcy court conducted an exhaustive review of the attorneys' fee application, disallowing certain fees in the amount of $24,490.00. After disallowing this amount, the bankruptcy court concluded that Johnston had incurred $69,986 in attorneys' fees and costs and he was awarded this amount. Johnston was also awarded damages in the amount of $2,883.20. This amount reflected Johnston's inability to practice law from July 16 through July 19 and July 24 through July 25 due to the stay violation. Finally, the bankruptcy court found that Johnston was entitled to recover damages for emotional distress. According to the bankruptcy court, "[t]he threat of [Johnston] being incarcerated by August 1, 2001" and "the fear that he would lose his major client and his law practice if he were incarcerated, would obviously cause even a reasonable person to suffer significant emotional harm." The bankruptcy court determined that Johnston was entitled to $20,000 for this emotional harm.

II. Analysis

A. Jurisdiction

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158.

B. Standard of Review

Whether an automatic stay violation has occurred is an issue of law reviewed de novo. *In re LPM Corp.*, 300 F.3d 1134, 1136 (9th Cir. 2002). A bankruptcy court's determination regarding attorneys' fees will be upheld "unless the bankruptcy court abused its discretion or erroneously applied the law." *In re Baroff*, 105 F.3d 439, 441 (9th Cir. 1997).

C. Issues for Review

Sternberg presents three issues for review.[2] First, Sternberg claims there was insufficient evidence that he violated the automatic stay provision. Second. Sternberg states the amount of attorneys' fees awarded is excessive. And third, Sternberg believes Johnston was not entitled to any award of damages for emotional distress. These issues are addressed separately.

---

[2] Sternberg's brief presents six issues for review. The six issues, however, significantly overlap such that they can be categorized as presently only three claims.

1. Automatic Stay Violation

Sternberg argues that there was no violation of the automatic stay. Sternberg acknowledges, however, that "a separate United States District Court Judge has previously ruled that there was a willful violation of the automatic stay." (Opening Brief 6) "Under the law of the case doctrine, 'a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case.'" *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) (quoting *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000)). The law of the case doctrine does not apply if "(1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Id.* Sternberg does not provide any argument that one of these exceptions applies. Thus, based on the law of the case doctrine, the Court finds that there was a willful violation of the automatic stay.

2. Award of Attorneys' Fees

The bankruptcy court awarded attorneys' fees in the amount of $69,986 based on Sternberg's willful violation of the automatic stay. *See* 11 U.S.C. § 362(h) (allowing for an award of attorneys' fees as a sanction for willful violation of automatic stay). Sternberg argues that this amount "has no reasonable relationship to the amount in controversy." (Opening brief 8)

According to Sternberg, "[a]ll of the fees incurred by Johnston were incurred for no reason other than to further unwarranted litigation." (Id. 10) Sternberg provides no citation to the record in support of this statement and his statement is in direct conflict with the bankruptcy court's factual findings. The bankruptcy court "went through the painstaking task of reviewing each individual billing entry to determine the reasonableness of the fees and to ensure that the services were 'reasonably incurred' as a result of the violation of the stay." (bankruptcy court Order July 27, 2006) Because "factual determinations underlying an award of attorneys' fees are reviewed for clear error," and Sternberg has not provided any evidence that the bankruptcy court's factual conclusions were erroneous, the award of attorneys' fees will be affirmed. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1147-48 (9th Cir. 2001).

3. Emotional Damages

The parties agree that Ninth Circuit authority allows for the award of damages due to emotional distress. *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004). To recover these damages, "an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process)." *Id.* at 1149. The type of evidence an individual presents to establish these elements may

consist of "medical evidence" or non-expert testimony, such as testimony from family or friends. Corroborating evidence is not required, however, in cases where "significant emotional distress" is "readily apparent." *Id.* at 1150. In those cases, "the circumstances may make it obvious that a reasonable person would suffer significant emotional harm."[3] *Id.*

In this case, the bankruptcy court cited the "threat of being incarcerated" and Johnston's "fear of losing his major client and law practice if he were incarcerated" as circumstances that "would have caused even a reasonable person to suffer significant harm." Based on these factual findings, the bankruptcy court did not err in finding that Johnston was entitled to an award for emotional distress.

Sternberg argues that even if Johnston were entitled to an award for emotional distress damages, the amount awarded by the bankruptcy court was not appropriate. Sternberg makes general statements that the amount awarded for emotional distress damages must be reasonable, but he does not provide any substantive analysis of how the award in this case qualifies as "unreasonable." The Ninth Circuit has cited with approval an award of $5,000 in emotional distress damages to a debtor based on her being

---

[3] Sternberg cites to a variety of cases requiring corroborating evidence. (Opening Brief 16, 17) The Ninth Circuit has made it clear that such evidence is not required. *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004). Thus, the Court need not address Sternberg's argument that corroborating evidence was required.

"forced to cancel her son's birthday party" and "embarrassed in a check-out line at the supermarket." *Id.* (citing *In re Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995)). A fear that one might be incarcerated indefinitely is more substantial than these events and the bankruptcy court's award was reasonable.

D. Attorneys' Fees and Appeal

Johnston requests an award of fees incurred as a result of this appeal. *See In re Walsh*, 219 B.R. 783 (9th Cir. BAP 1998) ("[D]amages flowing from a stay violation include fees and costs incurred by the injured party in resisting a non-frivolous appeal."). Johnston shall comply with the requirements of Local Rule 54.2 regarding his request for fees.

Accordingly,

IT IS ORDERED the bankruptcy court's order is **AFFIRMED**.

DATED this 14th day of September, 2007.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

IT IS HEREBY ADJUDGED and DECREED this is SO ORDERED. [SEAL]

Dated: August 10, 2006

/s/ Sarah S. Curley
SARAH S. CURLEY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:	In Proceedings Under Chapter 11
LOGAN T. JOHNSTON, III, Debtor	Bk. No. 01-06221-ECF-SSC
	Adv. No. 01-885
LOGAN T. JOHNSTON, III, Plaintiff, v. PAULA PARKER; Melvin Sternberg et. al. Defendants.	**Judgement Against Melvin Sternberg**

It is hereby ORDERED granting Judgement to Plaintiff against Defendant Melvin Sternberg in the

amount of $92,869.20 plus post-judgement interest at the rate of 5.10% per annum.

The Honorable Judge Curley
Chief United States
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re LOGAN T. JOHNSTON III, Debtor	Chapter 11 Case No. 01-06221-PHX-SSC Adv. No. 01-885
LOGAN T. JOHNSTON III, Plaintiff, vs. PAULA PARKER, et al., Defendants.	MEMORANDUM DECISION (Opinion to Post)

INTRODUCTION

This matter comes before the Court on a "Motion (1) To Alter or Amend the Judgment; (2) For a New Trial; (3) For Relief; And/Or (4) For Reconsideration of the Court's Memorandum Decision as to Defendant Sternberg Only" ("Motion") filed on April 10, 2006, by Defendants Melvin Sternberg and Sternberg & Sternberg, Ltd. ("Defendants"). A hearing on the matter was held on May 16, 2006; thereafter the Court took the matter under advisement.

In this Memorandum Decision, the Court has not set forth its findings of fact and conclusions of law pursuant to Rule 7052 of the *Rules of Bankruptcy Procedure*. The issues addressed herein constitute a

core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b)(West 2006).

On March 31, 2006, the Court rendered a Memorandum Decision ("Decision") in the above-captioned adversary, resolving various issues remanded to the Court as a result of a decision by the Arizona Federal District Court.[1] In its Decision, this Court held that, based upon a change in Ninth Circuit case law, the Plaintiff, Logan T. Johnston III ("Plaintiff"), was entitled to assert a claim for emotional distress, such distress resulting from Defendant Sternberg's willful violation of the automatic stay. This Court further held that, as a result of the willful violation of the stay, the Plaintiff was entitled to the sum of $20,000 as damages for emotional distress, attorneys' fees and costs in the amount of $69,986, and damages in the amount of $2,883.20 for being unable to expend the usual billable hours on his major client (essentially "lost wages").

In their current Motion, the Defendants' request for relief predicated upon (1) the Court's award of attorneys' fees, given the "extremely nominal award of actual damages – $2,883.20, and (2) Plaintiff's inability to meet the required evidentiary threshold to obtain any award of damages for alleged emotional distress."

---

[1] A more extensive procedural outline of the matter can be found at Docket Entry No. 107; Memorandum Decision as to Defendant Sternberg Only.

DISCUSSION

Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) provide for different motions directed to similar ends.[2] Rule 59(e) governs motions to "alter or amend" a judgment; Rule 60(b) governs relief from a judgment or order for various listed reasons. Rule 59(e) generally requires a lower threshold of proof than does 60(b), but each motion seeks to erase the finality of a judgment and to allow further proceedings. Rule 59(e) contains a strict ten-day deadline, while Rule 60(b) allows a year, sometimes more. *Helm v. Resolution Trust Corp.*, 43 F.3d 1163 (7th Cir. 1995).

Fed. R. Civ. P. 60(b) provides that on motion and just terms, the court may relieve a party from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

---

[2] The Rules of Bankruptcy Procedure incorporate Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) as Rules 9023 and 9024, respectively.

application; or (6) any other reason justifying relief from the judgment. Bankruptcy courts, as courts of equity, have power to reconsider, modify, or vacate their previous orders so long as no intervening rights have become vested in reliance on orders. *In re Lenox*, 902 F.2d 737 (9th Cir. 1990). Although the bankruptcy rule governing relief from judgment on grounds of mistake, inadvertence, surprise, or excusable neglect, provides that the court may relieve a party from a final order upon motion, it does not prohibit a bankruptcy judge from reviewing, sua sponte, a previous order. *In re Cisneros*, 994 F.2d 1462 (9th Cir. 1993).

Fed. R. Civ. P. 59(a) lists the grounds for seeking relief as being "any of the reasons for which new trials have heretofore been granted . . . " This section has generally been interpreted to provide three grounds for granting Fed. R. Civ. P. 59 motions: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. *School Dist. No. 1J Multnomah County, OR v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *In re Gurr*, 194 B.R. 474 (Bankr. D. Ariz. 1996). A motion for reconsideration is not specifically contemplated by the Federal Rules. To the extent it is considered by the Court, it is under Fed. R. Civ. P. 59(e) to alter or amend an order or judgment. *In re Curry and Sorensen, Inc.*, 57 B.R. 824, 827 (Bankr. 9th Cir. 1986).

Reconsideration is appropriate if the court is presented with newly discovered evidence, committed clear error or the initial decision was manifestly unjust, or if there is intervening change in controlling

law. *School Dist. No. 1J Multnomah County, OR v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

The Defendants provide no basis for this Court's vacature or reconsideration of its Decision under either Rule. The Defendants fail to point to specific errors of facts, errors of law, or any newly discovered evidence that would merit reconsideration. Furthermore, the Defendants also provide no evidence of mistake, inadvertence, surprise, or excusable neglect, or fraud that would merit vacating the Court's previous Decision.

1. Attorney fees

The Defendants argue that given the "extremely nominal award of actual damages," the Court's award of attorney fees in the amount of $69,986.00 was unreasonable. Contrary to the Defendants' assertion, the actual damages awarded in this matter were not "nominal." In addition to the $2,883.20 awarded for lost wages, the Court awarded actual damages in the amount of $20,000.00 for the emotional distress claim. The Bankruptcy Code allows for actual and punitive damages, including costs and attorney fees, as sanctions for willful violations of the automatic stay. *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002). "Actual damages," such as may be recovered by any individual injured by willful violation of the automatic stay, include damages for emotional distress. *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004), *cert denied*, 126 S.Ct. 397 (2005).

The Bankruptcy Appellate Panel in *Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1 (9th Cir. BAP 2002) sustained a bankruptcy court's conclusion that the debtor incurred $5.00 in actual damages in traveling to her attorney's office to retain counsel to defend against a lawsuit filed in willful violation of the stay. *Id.* at 8-9. The Panel then considered the bankruptcy court's award of $1,000.00 in fees. The Panel rejected the creditor's argument that the $5 actual award was too slight to support the attorney's fee award. The Court "endorse[d] the use of the principles used in § 330 as a guide for awarding attorneys' fees under § 362(h)." *Id.* at 11. This requires, among other things, that the services be "actually" performed and that the charge therefore is "reasonable" in amount. *In re Risner*, 317 B.R. 830 (Bankr. D. Idaho 2004).

Counsel for the Plaintiff presented evidence, at the remand hearing, as to the attorneys' fees and costs incurred on behalf of the Plaintiff as a result of the willful violation of the stay. This Court considered the testimony, and extensively reviewed the Exhibits admitted into evidence. The Court reviewed the Fee Applications to determine if the fees and costs were reasonable and the hourly rate reasonable, and that the fees and costs related to the litigation concerning the willful violation of the stay, and any appeal thereof. This Court went through the painstaking task of reviewing each individual billing entry to determine the reasonableness of the fees and to ensure that the services were "reasonably incurred" as a

result of the violation of the stay. It is well established that the bankruptcy court has discretion to determine the reasonableness of the fees and costs and to set the amounts accordingly. *In re Stainton*, 139 B.R. 232 (9th Cir. BAP 1992).

The Defendant cite the Court to the decision of *In re McHenry*, 179 B.R. (9th Cir. BAP 1995) in support of their argument that the attorneys' fees and costs awarded to the Plaintiff are unreasonable. In *McHenry*, the bankruptcy court rejected the debtors' request for punitive damages based on a creditor's violation of the automatic stay. The creditor which held an interest in the debtors' car had called the Debtors to discuss their delinquent car payments, in violation of the stay. The creditor was referred to the debtors' attorney, who told the creditor that the debtor did not intend to reaffirm the debt and would surrender the vehicle to the creditor. The creditor called the debtors and made arrangements to pick up the vehicle. The debtors then filed a motion for sanctions, requesting attorneys' fees, noneconomic damages of $5,000 and punitive damages. In affirming the bankruptcy court's decision, the Bankruptcy Appellate Panel observed that there is no appropriate way to measure punitive damages when the offended party has not suffered actual damages. *Id.* at 169. The Panel concluded that "no punitive damages should be awarded in the absence of actual damages." *Id.* at 168. The Panel also recognized that the automatic stay afforded by section 362 is intended to be a shield protecting debtors and their estates, and

should not be used as a sword for their enrichment. *Id.* at 169.

The case at bar is factually distinguishable. In *McHenry*, the debtors did not have any actual damages or injury due to the stay violation because their attorneys' fees were incurred in the filing of an unnecessary motion for sanctions. In this case, the Court did find that actual damages were incurred. Moreover, the reality of the situation is that this Court was presented with a unique set of facts. At the time of remand, the Ninth Circuit issued its new published opinion in *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004), *cert. denied.*, 126 S.Ct. 397 (2005), which significantly altered the "playing field." The Ninth Circuit effectively reversed its prior decision in *Dawson v. Washington Mutual Bank*, 367 F.3d 1174 (9th Cir.), *withdrawn*, 385 F.3d 1194 (9th Cir. 2004), now providing for a cognizable claim for emotional distress. After conducting a hearing on the Defendant's Motion in Limine, this court concluded that since it had not entered a final decision in the adversary, and the matter had been remanded to this Court to allow the Defendant to present affirmative defenses, the Court would have to allow evidence of any emotional distress that the Plaintiff might have suffered, and any damages that resulted therefrom, because of the intervening change in Ninth Circuit law.[3]

---

[3] As part of its analysis of the Defendants' Motion in Limine, and as discussed in its Decision, this Court agreed with

(Continued on following page)

The Defendants also argue that the attorneys' fees should be limited up to the time that the alleged violation was remanded. However, the Defendants cite no authority and the Court is not aware of any such authority that establishes this type of time restraint in the assessment of attorney's fees in automatic stay violation litigation. Both sides expended a great deal of time and effort, incurring substantial attorneys' fees in this matter.

Based upon the foregoing, the Court concludes that the attorneys' fees and costs assessed in this matter are reasonable. The Defendants provide no basis for this Court's vacature or reconsideration of its award of attorneys' fees.

2. Damages for Emotional Distress

The Defendants acknowledge that Ninth Circuit authority provides for a cognizable claim for emotional distress; however, they argue that in the case at bar, there is no basis to assess damages for emotional distress. The Defendants set forth the three-prong test for awarding such damages, as articulated in *In re Dawson*, 390 F.3d 1139 (9th Cir.

Defendant Sternberg that the evidence to be presented by the Plaintiff on the issue of emotional distress would be limited by prior proceedings in this adversary. For instance, Plaintiff's counsel conceded that he would not introduce any medical evidence supporting the Plaintiff's claim of emotional distress because of a prior ruling of this Court and counsel's stipulation on the record.

2004), *cert. denied*, 126 S.Ct. 397 (2005), and argue that the evidence in the present case failed to satisfy the test.

In its Decision, the Court analyzed, in detail, the three-prong test set forth in *Dawson*. Pursuant to *Dawson*, to be entitled to damages for an emotional distress claim, the debtor must "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm, and the violation of the automatic stay . . . " *Id.* at 1149. "Fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm. (Citation omitted.)" *Id.* Moreover, the Ninth Circuit concluded that there were a number of ways, from an evidentiary standpoint, to show such harm. The debtor could (1) present corroborating medical evidence,[4] (2) have non-experts, such as family members, friends, or co-workers, testify as to the "manifestations of mental anguish and clearly establish that significant emotional harm occurred,"[5] or (3) simply rely on the fact that the emotional distress was readily apparent.[6] *Id.* at 1149-50. As this Court noted in its Decision, under the third prong, the Ninth Circuit opined that even if the violation of the stay were not

---

[4] *In re Briggs*, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992).

[5] *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 821-22 (1st Cir. BAP 2002).

[6] *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987).

egregious, the very circumstances might make it obvious that a reasonable person would suffer significant harm.[7] *Id.* at 1150. Even if significant harm had been clearly established, the debtor must also show that there was a nexus between the claimed damages and the violation of the stay. Such a causal connection must be clearly established or readily apparent. *Id.*

This Court did conclude that Defendant Sternberg's failure to take affirmative action was not egregious.[8] The Court also concluded that the Plaintiff had shown a significant harm to himself. The threat of being incarcerated, with the fear of losing his major client and law practice if he were incarcerated, would have caused even a reasonable person to suffer significant harm. As a result, the Court concluded that the Plaintiff established a claim for emotional distress. Moreover, as articulated by the Court:

> It is also clear that Defendant Sternberg's failure to take affirmative action, based upon the facts of this case, led to the Plaintiff's injury. The causal link between Defendant Sternberg's failure to have the Minute Entry Order rescinded, or to request that the State Court action be stayed, and the harm to the

---

[7] *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995).

[8] Although Defendant Sternberg was essentially out of the office from July 13 to July 31, the Plaintiff expected Defendant Sternberg or his firm to take affirmative action to vacate the Minute Entry Order, which they failed to do.

> Plaintiff is readily apparent. Hence, the Plaintiff is entitled to damages for the emotional distress that he suffered.

Decision, p. 33.

In assessing damages, the Court relied, in part, on the Decision of *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995), a case also cited with approval by the court in *Dawson*. In *Flynn*, the court awarded the debtor $5,000 in emotional distress damages after, as a result of the violation of the automatic stay and the IRS freezing her bank account, she was forced to cancel her son's birthday party. In this case, the threat of incarceration, with the fear of losing his law practice and livelihood, warranted a more significant assessment of damages. Therefore, the Court awarded the Plaintiff $20,000.

Contrary to the Defendants' assertions, the substantiated evidence in this case, as well as the holding of *Dawson*, compel this Court to conclude that the Plaintiff established a claim for emotional distress, and is entitled to damages as a result. A motion for reconsideration should not be used to ask the court to rethink what the court has already thought through, rightly or wrongly. *In re America West Airlines, Inc.*, 240 B.R. 34 (Bankr. D. Ariz. 1999). Accordingly, a motion for reconsideration may properly be denied when the motion fails to state new law or facts. *In re St. Paul Self Storage Ltd. Partnership*, 185 B.R. 580 (9th Cir. BAP 1995).

CONCLUSION

Based upon the foregoing, the Court concludes that the attorneys' fees and costs assessed in this matter are reasonable and consistent with Ninth Circuit law. Moreover, the Plaintiff is entitled to recover for his emotional distress pursuant to *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004), *cert. denied.*, 126 S.Ct. 397 (2005). The Defendants have provided no basis for this Court's vacature or reconsideration of its Decision. The Defendants' Motion is, therefore, DENIED.

DATED this 27th day of July, 2006.

/s/ Sarah Sharer Curley
Honorable
Sarah Sharer Curley
U. S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re LOGAN T. JOHNSTON, III, Debtor	Chapter 11 Case No. 01-06221-PHX-SSC Adv. No. 01-885
LOGAN T. JOHNSTON, III, Plaintiff, vs. PAULA PARKER, et al., Defendants.	MEMORANDUM DECISION AS TO DEFENDANT STERNBERG ONLY (Opinion to Post) (Filed Mar. 31, 2006)

I. INTRODUCTION

Logan T. Johnston III, the plaintiff in this adversary, and the Debtor-in-Possession, commenced this proceeding against Paula Parker, his ex-spouse, and Melvin Sternberg, her divorce attorney, and another individual on July 23, 2001. After various pretrial matters were considered,[1] the Plaintiff presented his

[1] Early in these proceedings, certain Defendants filed a Motion to Dismiss the Complaint, which was denied, and various Motions for Reconsideration, which were also denied. Because the Defendants appealed the various orders denying their motions, the pretrial matters were not resolved for an extended period of time. Various discovery issues also delayed the start of the trial. The Plaintiff had also included a judge of the Arizona Trial Court (the Maricopa County Superior Court) who had

(Continued on following page)

case to the Court over several days. When the Plaintiff rested, the Defendants Parker and Sternberg moved that the Complaint be dismissed because the Plaintiff had failed to show a violation of the stay by the remaining Defendants; or, in the alternative, if the stay violation had been shown, the remaining Defendants did not act willfully, and no damages had been proven by the Plaintiff.

The Court issued its Memorandum Decision on the Defendants' request that the complaint be dismissed on August 8, 2003.[2] The Order incorporating the Decision was entered on August 28, 2003.[3] The parties appealed the Decision and Order, and on September 30, 2004, the Arizona Federal District Court entered its Decision, affirming this Court, in part, setting aside the Court's ruling that the complaint be dismissed, and remanding the matter for further consideration by this Court. The Court conducted further proceedings consistent with the remand order.[4] Ultimately the remanded issues were

---

presided over the Plaintiff's and Parker's divorce proceedings as one of the Defendants. However, as the proceedings progressed in this Court, the Plaintiff determined not to seek any relief against the Judge, since the Minute Entry Order previously entered by the State Court Judge had already been vacated by this Court.

[2] Docket Entry No. 129.

[3] Docket Entry No. 132.

[4] For instance, the Court conducted a hearing on the Defendant Sternberg's Motion in Limine, which was fully briefed by all parties and on which this Court conducted a hearing on

(Continued on following page)

tried, at an evidentiary hearing which lasted several days.[5] Thereafter the Court took the matter under advisement.

The C[illegible] was recently advised that the Plaintiff has settled his various claims against the Defendant Paula Parker.[6] Therefore, this ruling only considers the issues raised by the Plaintiff against the Defendant Sternberg.

In this Memorandum Decision, the Court has set forth its findings of fact and conclusions of law pursuant to Rule 7052 of the *Rules of Bankruptcy Procedure*. The issues addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b) (West 2005).[7]

May 19, 2005. At the conclusion of the hearing, the Court determined that the Plaintiff could present evidence on the issue of emotional distress, with some limitations, which are discussed more completely in this Decision.

[5] The trial was conducted on June 12 and August 29, 2005.

[6] See Notice to the Court, Docket Entry No. 196, filed on March 10, 2006.

[7] All references in this Decision are to the Bankruptcy Reform Act of 1978, as amended, and to the *Rules of Bankruptcy Procedure* ("RBP") unless otherwise indicated. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Act") is not applicable. Pursuant to Section 1501, except as otherwise provided by the Act, the amendments made by the Act would not apply with respect to cases commenced under title 11, United States Code, before the effective date of the Act, that is, October 17, 2005. The Debtor filed his Chapter 11 petition on May 14, 2001.

II. FACTUAL BACKGROUND

On May 14, 2001, the Debtor filed his Chapter 11 petition for relief with the Court, and, as previously noted, filed this adversary proceeding on July 23, 2001. In the Complaint, the Debtor alleged that the Defendant Sternberg proceeded with a series of State Court actions, in violation of the automatic stay, after he and/or his firm were aware that the Debtor had filed his bankruptcy petition.

With the filing of this adversary proceeding, the Debtor simultaneously filed an "Emergency Motion for Ruling That State Court's Minute Entry Violate[d] the Automatic Stay." An expedited hearing on the Emergency Motion was held in this Court on July 31, 2001. At the conclusion of the hearing, this Court vacated the Minute Entry Order of the Maricopa County Superior Court, dated June 26, 2001, but entered on the docket and sent to the Debtor and the Defendant Sternberg on July 13, 2001. The Debtor's counsel also proceeded with this adversary, because he believed that Defendant Sternberg had willfully violated the stay and that compensatory and punitive damages should flow from his actions.

However, prior to the hearing in this Court on July 31, 2001, a number of proceedings had occurred in the Maricopa County Superior Court. The Maricopa County Superior Court entered a Decree of Dissolution of Marriage on January 2, 1996, dissolving the marriage of the Debtor and Ms. Parker. As a part of the Decree, the Debtor was ordered to pay to Ms.

Parker the sum of $366,948.45, as well as $2,000 per month in support obligations. On January 22, 2001, Ms. Parker and Defendant Sternberg filed, in the Superior Court, a request that the Debtor be held in contempt regarding the nonpayment of spousal maintenance or support. At all relevant times, Ms. Parker was represented in the Superior Court by Defendant Sternberg.

On May 17, 2001, the State Court held a hearing on the request that the Debtor be held in contempt. The parties have presented this Court with a transcript of those proceedings.[8] The Debtor represented himself before the State Court.[9] It was not until, perhaps, ten to fifteen minutes into the hearing that the Debtor advised the State Court Judge that he had just filed a Chapter 11 proceeding a few days earlier on May 14, 2001. Moreover, the Debtor's bankruptcy attorney did not file any notification of the commencement of the bankruptcy proceedings with the State Court until May 17, the date of the hearing.[10] Ms. Parker, Defendant Sternberg, and the State Court did not have the benefit of the Notice of Chapter 11 Filing when the May 17 hearing commenced.

---

[8] Exhibit A.

[9] The Debtor is an attorney admitted to practice in Arizona.

[10] Exhibit 2. The Notice of Filing Chapter 11 Bankruptcy is also attached as Exhibits B and C to the Debtor's July 23, 2001 Emergency Motion for Ruling That State Court's Minute Entry Violates Automatic Stay, Docket Entry No. 2.

It is clear from the transcript that the State Court Judge struggled with how and whether to proceed.

After being advised of the positions of the parties, including the Debtor, the State Court Judge concluded that she should proceed with the hearing to determine whether the Debtor was in contempt of Court for failure to comply with the Divorce Decree or a State Court Order, but that there would be no execution on any judgment until the issue of whether the automatic stay applied to the collection of the unpaid support obligations could be clarified in the Bankruptcy Court.[11] At the conclusion of the contempt proceedings, the State Court took the matter under advisement.

The May 17, 2001 Notice filed by the Debtor in the State Court proceedings stated as follows:

> Please take notice that . . . [the Debtor] has filed a Chapter 11 Bankruptcy Petition with the U.S. Bankruptcy Court on May 14, 2001. Accordingly, this action is stayed except those portions that relate to § 362(b). [The Debtor] will be proposing a plan under Chapter 11 to cure any arrears on pre-bankruptcy maintenance payments owed to Ms. Parker.[12]

This very notice may have created confusion. It left open the possibility that the State Court could

---

[11] Exhibit A at page 29.

[12] Exhibit 2.

proceed under one of the exceptions to the automatic stay.

In a Minute Entry dated June 22, 2001, and filed in the State Court on July 13, 2001 ("July 13, 2001 Minute Entry," "Minute Entry" or Minute Entry Order"), the State Court found that the Debtor was in violation of the Divorce Decree. Specifically, the Debtor had made no support payments since October, 1998, leaving an arrearage in the amount of $87,525.60. The Minute Entry also stated that the Debtor was in contempt of court and ordered that he pay the full amount, of the then $87,515.60 Judgment, by August 1, 2001. If the Debtor failed to pay the Judgment by that date, he would be "incarcerated in the Maricopa County Jail for an indefinite period of time until the full amount of arrearages was paid in full."[13]

It may not be gainsaid that all parties to the State Court litigation were surprised by the Minute Entry Order. The evidence presented before this Court reflected that the Defendant Sternberg had expected further proceedings before the Judge would order the Debtor to pay a sum certain or face any consequences. The Debtor, still representing himself in the State Court proceeding, filed a Motion for Stay and Telephonic Hearing in the State Court.[14] However, the State Court Judge did not set a hearing until August 2, 2001, the day *after* he was to pay the

[13] Exhibit B at page 2.

[14] Exhibit C.

amount of $87,525.60 or face incarceration. The Debtor's bankruptcy counsel meanwhile attempted to contact the State Court Judge (on July 16, 2001 by facsimile) and Defendant Sternberg and Ms. Parker's recently retained bankruptcy counsel on July 17, 2001.[15]

Because the Debtor wanted to proceed simultaneously in the State Court and the Bankruptcy Court, the Debtor immediately sought appellate review of the State Court's July 13, 2001 Minute Entry Order. However, the evidence reflects that Defendant Sternberg left town on July 23, 2001, shortly after receipt of the July 13, 2001 Minute Entry Order, and that it was a partner at his firm who filed the responsive brief in the State appellate proceedings. In the State appellate proceedings, Defendant Sternberg's firm presented the position that the State Court had only proceeded within an exception to the automatic stay. This Court has reviewed the cases cited in the appellate brief, some of which will be discussed later in this Decision, and concludes that the brief was appropriately researched and the arguments presented were not frivolous.

By July 23, 2001, the Debtor and his bankruptcy counsel had filed the Complaint in this adversary, and their Emergency Motion to set aside the July 13, 2001 Minute Entry Order. On July 31, 2001, this

[15] See the Debtor's Emergency Motion filed with this Court, Docket Entry No. 2.

Court conducted a hearing on the Debtor's Emergency Motion and concluded that the automatic stay had been violated and vacated the July 13, 2001 Minute Entry Order. At approximately the same time, the State Appellate Court issued a stay of the July 13, 2001 Minute Entry, awaiting this Court's determination of the matter. This Court must emphasize that although it vacated the State Court's Minute Entry Order, it left for future proceedings whether the Defendant Sternberg had willfully violated the automatic stay and whether compensatory and punitive damages would flow from the violation.

The parties have subsequently debated at great length what this Court relied on at the July 31, 2001 hearing. Although the July 31 hearing consisted primarily of oral argument, the Debtor's Emergency Motion did contain Schedule I from the Debtor's Schedules, filed under penalty of perjury, and an Affidavit of Ms. Parker dated March 8, 2001, filed in the State Court proceedings.[16] The Debtor did not list his current spouse's income on the Schedule, but the law firm distribution to him was listed at $6,500 per month. The Schedule also reflected that within a year of filing his petition, the Debtor expected his compensation to increase to $16,000 per month.[17] Ms. Parker's Affidavit listed net monthly income of

---

[16] Docket Entry No. 2, Exhibits E and F thereto.

[17] *Id.*, Exhibit E, Schedule I.

$2,369.82, $85,000 in a money market account, and $1,400,000 in "stocks, bonds, securities."[18]

At the July 31, 2001 hearing, Debtor's counsel argued that the Debtor's Schedules and Statement of Affairs reflected that he had no assets to pay the $87,525.60 obligation by August 1, 2001, that his compensation, the only potential property that he had that was not property of the bankruptcy estate, was clearly insufficient to pay the obligation, and that as a result, the State Court Judge's overly broad Minute Entry Order violated the stay, because it required that property of the estate be utilized to pay the obligation.

If the State Court had qualified its Order to reflect only the amount of the arrearages, or if the State Court had been advised of what constituted non-estate property, so that the Minute Entry Order could be tailored only to the collection of the arrearages from such non-estate property, then the State Court arguably would have been acting within an exception to the automatic stay. However, the Minute Entry dictated that the Debtor immediately satisfy a large Judgment or face incarceration; all without the State Court focusing on the non-estate property to pay such a Judgment or requesting the Bankruptcy Court's prior determination of whether the automatic stay applied to the property from which the Judgment would have been satisfied.

---

[18] *Id* , Exhibit F.

After the July 31, 2001 Minute Entry order was entered, Ms. Parker and Defendant Sternberg defended their legal position in the State Courts and the Bankruptcy Court. The Plaintiff could provide no evidence that Defendant Sternberg attempted to execute on or control any of the Debtor's assets. The Defendant Sternberg did not file any motion or petition seeking to enforce the Minute Entry Order, but either he or his firm did respond to the pleadings filed by the Debtor in the State and Federal Courts. Although Defendant Sternberg was essentially out of the country from July 3 to July 16 and out of town from July 23 through July 31, 2000, the Debtor and his bankruptcy counsel expected the Defendant or Defendant Sternberg's firm to take affirmative action to vacate the Minute Entry Order. The evidence reflects that the Defendant did not file a pleading, motion, or petition which would constitute such affirmative action.

At the initial trial, the Debtor provided confusing, sometimes conflicting, testimony as to any injury he might have suffered as a result of his having to file the pleadings in the State and Appellate Court to stay the July 13, 2001 Minute Entry Order.[19] At the trial

---

[19] The Debtor's testimony was confusing or conflicting at times. The Debtor stated that he drafted various pleadings for the State Court proceedings to obtain a stay which pulled him away from his practice of law. However, he also testified that he typed the pleadings himself, so it was difficult to discern what time he spent researching and analyzing legal issues and what time he spent on the ministerial task of typing the documents. It

(Continued on following page)

on remand, the Debtor did provide some evidence that his gross income did vary during the July 2001 time period. For instance, for the July 16-31, 2001 time period, the Debtor decreased the hours that he was able to bill to his primary client.[20] In reviewing his monthly interim reports, once he filed his bankruptcy proceeding, the Debtor's gross revenues for the months of June, July and August, 2001, were compared.[21] Based upon the evidence presented, the Court concludes that the Debtor did credibly testify that he was unable to expend the usual time, at his

---

was also impossible to determine his skill as a typist. For instance, did he require 10 hours or more just to type the documents? He presented no written evidence which broke out his time on the various matters; such as researching, analyzing, drafting, typing, etc. Moreover, given the wide fluctuation in his monthly gross and net income, it was impossible to determine whether he had lost any business from proceeding in the State Court on his own behalf.

[20] Exhibit H. The Debtor did not focus on any change in his activities for July 13, 14, or 15, 2001. It is unclear from the record whether this was over the weekend or there were other unrelated events which precluded the Plaintiff from billing over these few days.

[21] Exhibit J. The monthly interim report for July 2001, which set forth income and expenses for June 2001, reflected gross revenues for the Debtor of $28,099. The monthly report for August 2001 (capturing the income and expenses for July 2001) did show a marked decrease in revenues of $18,578. Finally, the monthly report for September 2001 (for the August time period) reflected gross revenues for the Debtor of $22,464. The Debtor's testimony was that only the threat of incarceration and his attempt to prepare pleadings for the State Courts were the only variance causing the marked decrease in income in July 2001.

standard billing rate, that he had previously or subsequently billed to his major client. However, the State Court issued its Minute Entry Order on July 13, 2001, and this Court vacated said Order by July 31, 2001. Therefore, the Debtor focused on the amount of time that he was able to bill during the aforesaid brief period of time and how it differed from his usual daily billing practices.[22] The Court is able to determine that for July 16 through July 19 and for July 24 and July 25, the Debtor did not bill a six-hour day, which appears to be fairly typical for the time period. Using a six-hour day as a typical day, the Debtor would have billed thirty-six hours over the critical six days in question. Instead he billed 19.04 hours. If one subtracts 19.04 from 36, that is a loss in billable hours of 16.96. The Debtor testified that his hourly rate at the time was $170. Thus, the Debtor suffered compensatory damages of 16.96 times $170 or $2,883.20.

Because of a change in Ninth Circuit law, the Debtor was also able to testify, at the remand trial, that during this time period from July 16 to July 31, 2001, he was distressed, upset, and unable to work efficiently because of the threat that he might be incarcerated on August 1, 2001. The Debtor testified that he believed that his legal career was over. He was distraught during this albeit relatively brief

---

[22] Exhibit H. See the entries for July 16, 17, 18, 19, 24, and 25. By July 31, 2001, the Minute Entry Order was vacated, and he was able to bill his major client for a normal day of work.

period of time. The Debtor conceded that he did not seek medical treatment and did not take any medication for his distress. The Court does conclude that his testimony of the extreme distress that he was suffering from July 16 to July 31, 2001 was credible and palpable. The Debtor did establish at the first trial in this matter that he was unable to comply with the July 31, 2001 Minute Entry Order of the State Court even if he were to have liquidated estate property.

At the remand hearing, counsel for the Plaintiff presented evidence as to the attorneys' fees and costs incurred on behalf of the Plaintiff as to the willful violation of the stay. The Court has considered this testimony, as well as the Exhibits admitted into evidence by counsel. As a part of the process in determining to what extent these fees and costs shall be part of the actual damages that must be paid by Defendant Sternberg, the Court has reviewed the Applications to determine if the fees and costs are reasonable, the hourly rate is reasonable, that the fees and costs to relate to the litigation concerning the willful violation of the stay, and any appeal thereof, and that the time expended by counsel for Defendant Parker, who has settled with the Plaintiff, has not been included in the damages to be paid by Defendant Sternberg. However, there is one exception. To the extent that counsel for the Plaintiff expended time as to both Defendants, Defendant Sternberg shall be responsible for those fees and costs. He may have a claim against Defendant

Parker, but that is for the Court to determine another day.

Exhibit 30 contains, *inter alia*, an Amended Fee Application of Plaintiff's counsel, dated August 13, 2002. The first concern is that counsel billed time on August 2, 2001, pertaining to whether Defendant Sternberg should be liable for punitive damages to the Plaintiff. The Court had just vacated the Minute Entry Order of the State Court and Plaintiff's counsel had done no investigation of whether such damages would be warranted. Indeed the evidence presented reflects that as of this date, counsel for the Plaintiff had sent a fax to Defendant Sternberg. The other action involved the filing of a pleading with the State Appellate Court. Given the facts of this case, the Court concludes that the billing under such factual circumstances was unreasonable. The following entries will be disallowed by this Court:

Date	Attorney	Time billed	Amount Requested
8/2/01	JSV	.2 hours	$ 25.00
8/2/01	JSV	1.3 hours	$ 162.50
8/2/01	RJE	.5 hours	147.50
8/2/01	JSV	.5 hours	62.50

Subtotal: $397.50

The next area of concern is the Reply filed by the Plaintiff' [sic] counsel in the State Appellate Court. The actual brief filed with the Court was presented as

an Exhibit.[23] The Court has reviewed this Reply; it is no more than a couple of paragraphs. Although counsel is entitled to be compensated for the time expended, the amount listed in the Amended Fee Application is excessive as to the time billed. The Court will allow the time billed on August 9, 2001 to retrieve the Bankruptcy Court Minute Entry (8/9/01; JSV; .25 hours; $31.25) and the time by the associate to draft the brief Reply (8/9/01; JSV .5 hours; $62.50). The following entries shall be disallowed for the reasons articulated above.

8/8/01	RJE	.2 hours	$ 59.00
8/8/01	JSV	.2 hours	25.00
8/8/01	JSV	.5 hours	62.50
8/9/01	JSV	1.5 hours	187.50
8/9/01	JSV	.2 hours	25.00
8/10/01	RJE	.3 hours	82.50[24]
8/10/01	RJE	.2 hours	55.00
8/10/01	RJE	.3 hours	88.50
8/10/01	JSV	.3 hours	37.50
8/10/01	JSV	.1 hours	12.50
8/10/01	JSV	.25 hours	31.50
8/10/01	RJE	.2 hours	59.00
8/10/01	JSV	.2 hours	25.00

---

[23] Exhibit L.

[24] This entry refers to Smith v. Smith which is irrelevant to this case.

8/10/01	JSV	.2 hours	25.00
8/13/01	RJE	.2 hours	55.00
8/16/01	RJE	.2 hours	82.50[25]

Subtotal: $912.50

The next area of concern includes the numerous entries in the remaining portion of Exhibit 30, which have been highlighted, and the highlighted entries in Exhibits 31, 44, and 45.[26] Many of the entries related to discovery disputes, motions to compel, motions in limine, or settlement discussions that Plaintiff's counsel was embroiled in or resolving that related exclusively or almost exclusively to Defendant Parker. Given the unique factual and legal issues that Plaintiff's counsel needed to resolve as to Defendant Parker, it would be inappropriate to charge Defendant Sternberg with this time. Therefore, such time has been discussed or highlighted, and the time has been excluded or disallowed as damages to [sic] paid by Defendant Sternberg. However, if the Court,

---

[25] This entry referred to a review of the JMG&P capital account order, which does not relate to the other matters in this task category.

[26] The bulk of the highlighted entries focus on this area of concern. However, there are certain entries which have been excluded because they do not pertain to this litigation. For instance, when Plaintiff's counsel contacted an attorney with the United States Trustee, that entry would be properly chargeable against, and paid by, the bankruptcy estate as an administrative expense, but not as actual damages in this lift stay litigation. The Court has excluded this and similar entries. They have also been highlighted on the attached Exhibits.

in reviewing the entry, believed that Defendant Sternberg had joined in an issue and should be charged for at least one-half of the time, that has been noted by the Court as well. To make the analysis easier to review, the Court has set forth below, or in the highlighted entries on the attached Exhibit A through D to this Decision, the compensation that should be disallowed as damages.[27] As the Court discusses the invoices, it has provided a summary of what compensation was requested as damages, what has been disallowed, and what is the net compensation is to be paid to Plaintiff's counsel as damages by Defendant Sternberg.

Turning to the August 13, 2002 invoice, which was a part of Exhibit 30, but is not attached to this Decision, the Court will disallow the following entries related to the litigation by Plaintiff's counsel of

---

[27] Exhibit 30 is Exhibit A to this Decision; Exhibit 31, Exhibit B, Exhibit 44, Exhibit C; and Exhibit 45, Exhibit D. The Court has not attached to this Decision the entire Exhibits 30, 31, 44, and 45 admitted at trial, since the Plaintiff's counsel may have attached the entire Fee Application for a time period, but the Firm is only seeking to be reimbursed, as actual damages in this case, for that portion of the task-based billing and Application which pertain to this lift stay litigation and any appeals related thereto. Moreover, as to Exhibit 30, the Court has only attached the lift stay litigation from 3/14/2003 forward as Exhibit A, because the earlier invoices are too voluminous to attach to this Decision. The time entries from the 8/13/2002 invoice concerning the stay litigation are analyzed as part of the text in the next six or seven pages of this Decision.

issues that relate exclusively, almost exclusively, to Defendant Parker.

9/12/01	RJE	.2 hours	59.00
9/12/01	JSV	.1 hours	12.50
9/12/01	RJE	.5 hours	147.50
9/12/01	JSV	.2 hours	25.00
9/12/01	RJE	.2 hours	29.50[28]
9/12/01	JSV	.2 hours	12.50[29]
10/5/01	JSV	.2 hours	12.50[30]
10/8/01	RJE	.1 hours	13.75[31]
10/8/01	JSV	.5 hours	62.50
10/8/01	JSV	1.4 hours	87.50[32]
10/8/01	JSV	1.2 hours	75.00[33]
10/8/01	JSV	.2 hours	12.50[34]
10/9/01	JSV	.8 hours	50.00[35]
10/9/01	RJE	.1 hours	29.50
10/9/01	JSV	.1 hours	12.50
10/11/01	JSV	.3 hours	37.50

---

[28] Actual amount is $59 but the amount is divided in half.

[29] Actual amount is $25 but the amount is divided in half.

[30] Actual amount is $25 but the amount is divided in half.

[31] Actual amount is $27.50 but the amount is divided in half.

[32] Actual amount is $175 but the amount is divided in half.

[33] Actual amount is $150 but the amount is divided in half.

[34] Actual amount is $25 but the amount is divided in half.

[35] Actual amount is $100 but the amount is divided in half.

10/12/01	JSV	.4 hours	50.00
10/19/01	RJE	.5 hours	137.50
10/19/01	RJE	.2 hours	55.00
10/31/01	JSV	.1 hours	12.50
11/15/01	RJE	.1 hours	27.50
11/16/01	RJE	1.0 hours	275.00
12/1/01	RJE	.1 hours	29.50
12/4-1/2/02	RJE/JSV	3.3 hours	555.00[36]
1/2-1/14/02	RJE/JSV	3.7 hours	279.25[37]
1/14/02	RJE	.1 hours	29.50
1/14/02	RJE	.3 hours	88.50
2/8/02	RJE	.2 hours	55.00
2/8/02	RJE	.1 hours	27.50
2/14/02	RJE	.1 hours	27.50
2/14/02	RJE	.1 hours	27.50
2/18/02	RJE	.2 hours	55.00
2/18/02	RJE	.1 hours	27.50
2/18/02	RJE	.3 hours	82.50
2/18/02	RJE	1.0 hours	275.00
2/19/02	RJE	1.0 hours	275.00
2/19/02	RJE	.6 hours	165.00
2/19/02	RJE	.1 hours	27.50
2/19/02	RJE	.2 hours	55.00

[36] *See* Page 13 of 8/13/02 Ellett Law Firm Invoice.

[37] Actual amount is $558.50 but the amount is divided in half. *See* Page 14 of 8/13/02 Ellet Law Firm Invoice.

2/19/02	RJE	.5 hours	137.50
2/19/02	RJE	.1 hours	27.50
2/19/02	JSV	.3 hours	37.50
2/19/02	JSV	3.7 hours	462.50
2/19/02	JSV	.3 hours	37.50
2/20/02	RJE	.1 hours	27.50
2/20/02	RJE	.1 hours	27.50
2/20/02	RJE	.2 hours	55.00
2/20/02	JSV	.2 hours	25.00
2/27/02	RJE	.1 hours	27.50
2/27/02	RJE	.1 hours	27.50
2/28-3/6/02	RJE/JSV	10.4 hours	2488.00[38]
4/15/02	JSV	.2 hours	29.00
4/15/02	JSV	.4 hours	58.00
4/17/02	JSV	.3 hours	43.50
4/18/02	RJE	.3 hours	88.50
4/18/02	RJE	.2 hours	59.00
4/18/02	JSV	.7 hours	101.50
4/18/02	JSV	.4 hours	58.00
4/21/02	RJE	.3 hours	88.50
5/8/02	JSV	.6 hours	87.00
5/9/02	RJE	.5 hours	147.50
5/9/02	RJE	1.0 hour	295.00
7/10/02	RJE	.2 hours	59.00
7/10/02	RJE	.2 hours	59.00

[38] *See* Page 19 of 8/13/02 Ellett Law Firm Invoice.

7/10/02	RJE	.2 hours	59.00
9/4/02-1/8/03	RJE/JSV	19.6 hours	4,131.00[39]

Subtotal: $12,062.50

The Court next turns to the March 14, 2003, and the April 16, 2003 invoices that are a part of Exhibit 30 at the remand trial and are also attached to this Decision as Exhibit A. Thus, the parties may review this text and also turn to Exhibit A of this Decision to review the entries which have been disallowed. Again, the entries which are being disallowed relate to time expended by Plaintiff's counsel on matters relating exclusive, almost exclusively, to Defendant Parker and, hence, should not be chargeable as damages against Defendant Sternberg.

1/21/03	RJE	1.7 hours	501.50
1/21/03	RJE	.2 hours	59.50
1/22/03	RJE	.2 hours	59.00
1/22/03	RJE	.2 hours	59.00
1/22/03	RJE	.2 hours	59.00
1/22/03	RJE	.2 hours	59.00
1/23/03	RJE	1.0 hours	295.00

[39] This is the last entry from the 8/13/2002 invoice which is a part of Exhibit 30. The Court did not attach said invoice, as noted previously, because it is voluminous. The total fees requested in the 8/13/2002 invoice for this task are $41,213.50. The sum of $12,062.50 is set forth above as being disallowed. Therefore, the sum of $29,151.00 from the 8/13/2002 invoice as to the stay lift litigation shall be allowed.

1/23/03	RJE	.2 hours	59.00
1/23/03	RJE	.4 hours	118.00
1/23/03	RJE	.2 hours	59.00
1/28/03	RJE	.3 hours	44.25[40]
2/3/03	RJE	.3 hours	88.50
2/12/03	RJE	.2 hours	29.50[41]
2/14/03	JSV	.3 hours	43.50
2/14/03	JSV	.3 hours	72.50
2/14/03	JSV	.8 hours	116.00
2/14/03	RJE	1.2 hours	354.00
2/14/03	RJE	.8 hours	236.00
2/14/03	RJE	.6 hours	177.00
2/17/03	JSV	1.3 hours	188.50
2/17/03	JSV	.3 hours	43.50
2/17/03	RJE	.2 hours	59.00
2/17/03	RJE	.3 hours	88.50
2/17/03	RJE	.2 hours	59.00
2/17/03	RJE	.2 hours	59.00
2/17/03	RJE	.1 hours	29.50
2/17/03	RJE	.1 hours	29.50
2/18/03	RJE	.1 hours	29.50
2/18/03	RJE	.2 hours	59.00
2/18/03	RJE	.1 hours	29.50

---

[40] Actual amount is $88.50 but the amount is divided in half.

[41] Actual amount is $59 but the amount is divided in half.

2/18/03	RJE	.3 hours	88.50
2/18/03	RJE	.2 hours	59.00
2/18/03	JSV	.9 hours	130.50
2/19/03	RJE	.8 hours	236.00
2/20/03	RJE	.3 hours	88.50
2/24/03	RJE	.2 hours	59.00
2/24/03	RJE	.3 hours	88.50
2/24/03	RJE	.2 hours	59.00
2/25/03	RJE	.3 hours	88.50
2/25/03	RJE	.3 hours	88.50
2/26/03	RJE	.2 hours	59.00
2/26/03	RJE	.1 hours	29.50
2/27/03	JSV	.3 hours	43.50
2/27/03	RJE	.3 hours	88.50
2/27/03	RJE	.9 hours	265.50
2/28/03	RJE	1.2 hours	354.00
2/28/03	RJE	2.6 hours	767.00
2/28/03	RJE	.2 hours	59.00
2/28/03	RJE	.1 hours	29.50
2/28/03	RJE	.1 hours	29.50
3/3/03	JSV	1.0 hours	145.00
3/3/03	JSV	.3 hours	43.50
3/3/03	RJE	.1 hours	27.50
3/3/03	RJE	.2 hours	55.00
3/3/03	RJE	1.5 hours	412.50
3/3/03	RJE	.2 hours	55.00
3/3/03	RJE	.1 hours	27.50

3/4/03	RJE	.2 hours	55.00
3/4/03	RJE	.2 hours	55.00
3/5/03	RJE	.2 hours	55.00
3/5/03	RJE	.2 hours	55.00
3/5/03	RJE	.2 hours	55.00
3/6/03	RJE	.1 hours	27.50
3/12/03	RJE	.3 hours	82.50
3/13/03	RJE	.2 hours	55.00
3/13/03	RJE	.2 hours	55.00
3/14/03	RJE	.6 hours	165.00
3/14/03	RJE	.2 hours	55.00
3/19/03	RJE	.3 hours	82.50
3/19/03	JSV	.4 hours	25.00[42]
3/20/03	RJE	.2 hours	55.00
3/20/03	RJE	.5 hours	137.00
3/20/03	RJE	.4 hours	110.00
3/20/03	RJE	.2 hours	55.00
3/20/03	JSV	.3 hours	18.75[43]
3/21/03	RJE	.1 hours	27.50
3/21/03	RJE	.1 hours	27.50
3/24/03	RJE	1.5 hours	412.50

---

[42] Actual amount is $50 but the amount is divided in half.

[43] Actual amount is $37.50 but the amount is divided in half.

3/24/03	JSV	.2 hours	25.00
3/27/03	JSV	.2 hours	25.00[44]

Subtotal: $8,356.00

The Court now turns to Exhibit 31, at the remand trial, and disallows the following entries. The reason for the disallowance again pertains to services rendered to Defendant Parker. That should not be charged to Defendant Sternberg. The detailed invoice is attached hereto as Exhibit B, if the parties would like to review the entries which are allowed, as well as disallowed.

9/2/03	RJE	.1 hours	31.50[45]
9/17/03	RJE	.2 hours	63.00
9/17/03	RJE	.2 hours	63.00
9/18/03	RJE	.1 hours	31.50
9/24/03	RJE	1.0 hours	315.00
9/24/03	RJE	.8 hours	252.00
9/29/03	RJE	.3 hours	94.50
9/29/03	RJE	.2 hours	63.00
10/10/03	RJE	.1 hours	31.50

---

[44] This is last entry from Exhibit 30 presented at trial. See Exhibit A of this Decision for the itemized listing of services as set forth in the invoices dated 3/14/2003 and 4/16/2003. The fees set forth in the 3/14/2003 and the 4/16/2003 invoices are equal to the sum of $11,203.50 plus $10,522.50 or a total of $21,726.00. The sum of $8,356 has been disallowed, for a net compensation amount of $13,370.

[45] The entries shown hereinafter are from Exhibit 31 at the trial. Refer to Exhibit B of this Decision.

12/29/03	RJE	.2 hours	63.00
9/23/03	JSV	.2 hours	35.00
9/25/03	JSV	.7 hours	122.50
9/26/03	JSV	.4 hours	70.00
9/27/03	JSV	3.5 hours	612.50
9/27/03	JSV	.2 hours	35.00
9/27/03	JSV	.4 hours	70.00
9/27/03	JSV	.3 hours	52.50
9/27/03	JSV	.3 hours	52.50
9/27/03	JSV	.2 hours	35.00
10/7/03	JSV	.1 hours	17.50
10/27/03	JSV	.1 hours	17.50
12/31/03	JSV	.2 hours	35.00[46]
Subtotal: $2,163.00			

Following the same thought process, the Court next reviews Exhibit 44 from the remand trial. The parties also referred to Exhibit C to this Decision.

5/17/05	RJE	.5 hours	157.50[47]
5/17/05	RJE	.2 hours	63.00
6/1/05	RJE	.1 hours	31.50

---

[46] This is the last entry disallowed from Exhibit 31, which is attached as Exhibit B to this Decision. The total fees requested were $21,002. If the disallowed fees of $2,163.00 are subtracted, the net amount of $18,839.00 shall be allowed.

[47] The following entries listed on this page and hereinafter are from Exhibit 44 at trial. See Exhibit C to this Decision.

6/1/05	RJE	.1 hours	15.75[48]
6/7/05	RJE	.1 hours	15.75[49]
6/8/05	RJE	.1 hours	31.50[50]

Subtotal: $315.00

The Court has now set forth below those entries from Exhibit 45, at the remand trial, which should be disallowed as to Defendant Sternberg.

6/21/05	RJE	.1 hours	31.50[51]
8/5/05	RJE	.1 hours	31.50
8/22/05	RJE	.1 hours	31.50
8/22/05	RJE	.2 hours	63.00
8/23/05	RJE	.1 hours	31.50
8/26/05	RJE	.1 hours	31.50

---

[48] Actual amount is $31.50 but the amount is divided in half.

[49] Actual amount is $31.50 but the amount is divided in half.

[50] This is last entry from Exhibit 44, which is set forth, in relevant part, as Exhibit C to this Decision. The total fees requested are $5,580, of which $315 has been disallowed, for a net amount of $5,265.00 as compensation to be allowed to Plaintiff's counsel.

[51] The following entries are from Exhibit 45 at trial. See Exhibit D to this Decision.

8/26/05	RJE	.1 hours	31.50
8/26/05	RJE	.1 hours	31.50[52]

Subtotal: $283.50

Based upon this Court's analysis of all the fees requested by the Plaintiff's counsel for the lift stay litigation and any appeal relate thereto, the Court must exclude total fees in the amount of $24,490.00.

As noted previously, there are certain entries which have not been discussed from Exhibits 30, 31, 44, or 45, or highlighted on the attached Exhibits A through D that relate to the general discovery and trial preparation of Plaintiff's counsel for the stay lift litigation. These charges have remained as allowed charges or damages against Defendant Sternberg. Defendant Sternberg should be charged for this time as a part of the actual damages, since, in essence, he is like a joint tortfeasor who should be jointly and severally liable for the time and effort expended by Plaintiff's counsel. Defendant Sternberg may have a claim against Defendant Parker for the payment of her portion of these damages, but the Defendants will need to present their position separately on that matter if they are unable to resolve the issue.

---

[52] The total fees requested in Exhibit D are $4,954.50 of which the sum of $283.50 is disallowed, leaving a net amount of $4,671.00 as compensation for Plaintiff's counsel related to this matter.

Based upon this Court's review of the Exhibits presented by Plaintiff's counsel, this Court concludes that Plaintiff's attorneys fees' [sic] and costs in the amount of $69.986 shall be allowed as actual damages against Defendant Sternberg. The attorneys' fees and costs in the amount of $24,490 shall be excluded as damages for the reasons stated in this Decision.

Defendant Sternberg did not testify at the remand trial. Instead his counsel relied on the evidence previously presented to the Court. The Court wishes to emphasize that Defendant Sternberg previously credibly testified before this Court that he was initially surprised by the July 13, 2001 Minute Entry Order; that he was subsequently out of the country from July 3 to July 16, 2001, and out of town for the period from July 23, 2001 through August 1, 2001; that based upon the research done at his firm, he believed that he was within an exception to the automatic stay and simply responded to the various pleadings filed by the Debtor; and that he took no affirmative action to execute on or control bankruptcy estate or non-estate assets or to collect on the obligation.[53]

---

[53] At the remand trial, Plaintiff's counsel relied on Exhibit N to reflect that Defendant Sternberg was aware of the Minute Entry Order around July 17, 2001, and took independent action to uphold said Order in the State Appellate Court which was an ongoing willful violation of the stay. However, a review of the entire transcript, including Pages 53-58, reflects that Defendant

(Continued on following page)

III. ISSUES.

As a result of the Arizona District Court's Decision, on appeal, the Court must narrow the issues to be considered at this time. The District Court has already concluded that the State Court initially acted on its own in issuing the July 31 Minute Entry Order. However, the District Court also concluded that Defendant Sternberg willfully violated the automatic stay through his failure to act affirmatively to rescind or expunge the July 31, 2001 State Court Minute Entry Order, or to request a stay of the State Court proceedings. The Arizona District Court classified this failure to act as an ongoing willful violation of the stay. On remand, this Court was initially to consider whether the Defendant had any affirmative defenses, which, if proven, would vitiate any claim of damages to be recovered by the Plaintiff. If the Court determined that there were no affirmative defenses which would assist Defendant Sternberg, the Court was also to consider the issue of damages incurred by the Plaintiff.

Sternberg had just returned from a trip out of the country on July 17, so that his review of the Minute Entry Order on that day was limited by his jet lag. Defendant Sternberg also spent two hours on one day and one-half hour on another day in conference on the matter with his partner or determining how he might proceed before Defendant Sternberg left town again. Given the extensive amount of time expended by Plaintiff's counsel and the Plaintiff on these matters in both the State and this Court, the Court concludes that when Defendant Sternberg stated he did not recall reviewing the Minute Entry Order or spending a lot of time on it, that testimony was credible.

However, as the time of the remand, the Ninth Circuit issued a new published opinion in the *Dawson* case.[54] This Court conducted a hearing on the Defendant Sternberg's Motion in Limine to determine to what extent *Dawson* applied to the issues to be determined by this Court. At the end of the hearing, the Court concluded that since the Court had not entered a final decision in this adversary and the matter had been remanded to this Court to allow Defendant Sternberg to present any affirmative defenses that he might have, the Court must allow in the evidence of any emotional distress that the Plaintiff may have suffered and any damages that might have resulted therefrom. However, the Court also agreed with Defendant Sternberg that since, as a part of pretrial proceedings, the Plaintiff had conceded that he had never sought medical attention, or taken any medication, during the relevant time period in July 2001, the Plaintiff should be limited in the evidence that he would be allowed to present of any emotional distress. The Plaintiff agreed to be bound by his prior admissions and agreed not to present any medical evidence on the issue of emotional distress.

---

[54] *Dawson v. Washington Mutual Bank (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004).

The issues on remand may be summarized as follows:

A. Whether the Plaintiff is entitled to damages for being unable to expend the usual billable hours on his major client.

B. Whether the Plaintiff is entitled to his attorneys' fees for Defendant's Sternberg's willful violation of the automatic stay.

C. Whether the Plaintiff suffered any emotional distress as a result of Defendant Sternberg's violation of the stay. If so, what damages should be accorded the Plaintiff.

IV. DISCUSSION.

Pursuant to § 362(a), the automatic stay acts as a broad injunction against creditors attempting to "collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6) (West 2005). The purpose of the automatic stay is to give the debtor a breathing spell from the collection efforts of his or her creditors, prevent a veritable "race to the courthouse," and possibly to aid in an effective reorganization of the Debtor's obligations while providing for an orderly distribution to creditors of the estate. *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

The broad injunctive relief granted by § 362(a) does have its limits. Particularly germane to the discussion in this case are the various exceptions involving domestic relations actions. The Code exempts

from the automatic stay's reach those actions involving the establishment of paternity,[55] commencing or continuing an action to establish alimony, maintenance, or support[56] and the collection of alimony, maintenance or support from non-estate property.[57] While these are clearly delineated as exceptions to the automatic stay, the Bankruptcy Court, not the State Court where the domestic relations action is pending, remains the final arbiter with regard to questions regarding the scope and applicability of the automatic stay. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) ("A state court does not have the power to modify or dissolve the automatic stay . . . if it proceeds without bankruptcy court permission, a state

---

[55] 11 U.S.C. § 362(b)(2)(A)(i) (West 2005) provides:

> The filing of a petition under section 301, 302 or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 does not operate as a stay –
>
> (2) under subsection (a) of this section –
>
> (A) of the commencement or continuation of an action or proceeding for –
>
> (i) the establishment of paternity; or

[56] 11 U.S.C. § 362(b)(2)(A)(ii) (West 2005) provides:

> (ii) . . . the establishment or modification of an order for alimony, maintenance, or support; or. . . .

[57] 11 U.S.C. § 362(b)(2)(B) (West 2005) provides:

> (B) of the collection of alimony, maintenance, or support from property that is not property of the estate.

court risks having its final judgment declared void.") *Id.* at 1087.[58]

The Ninth Circuit next turned to the application of the particular exception to the automatic stay, namely, § 362(b)(1). Subsection (b)(1) specifically exempts from the reach of the automatic stay any "commencement or continuation of a criminal action or proceeding against the debtor[.]" *Id.* at 1085; 11 U.S.C. § 362(b)(1) (West 2005). Finding that the clear language of § 362(b)(1) as well as a traditional federal deference to state criminal actions controlled, the Ninth Circuit concluded that the state court proceed with the criminal prosecution without violating the automatic stay. In doing so, the Court expressly overruled *Hucke v. Oregon*, 992 F.2d 950 (9th Cir. 1993), which had held that if the underlying purpose of a state's criminal action was the collection of a debt, § 362(a)(6) applied, and the state could not

---

[58] The view that the State Court lacks subject matter jurisdiction to determine the scope of the stay has not been uniformly accepted. In the 2nd, 5th and 6th Circuits, the State Courts have concurrent jurisdiction with the bankruptcy courts to determine whether the automatic stay, or an exception, applies. *In re Baldwin-United Corporation Litigation (Erti v. Paine Webber Jackson & Curtis)*, 765 F.2d 343, 347 (2nd Cir. 1985); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986); *In re Bona*, 110 B.R. 1012 (Bankr. S.D.N.Y. 1990). aff'd 124 B.R. 11; *Cisneros v. Cost Control Marketing an* [sic] *Sales Management of Virginia, Inc.*, 862 F. Supp. 1531 (W.D. Va. 1994), aff'd 64 F.3d 920, cert denied 116 S.Ct. 1673, 517 U.S. 1187, 134 L.Ed.2D 777; *Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990).

proceed without violating the automatic stay. *Id.* at 1085.

Thus, it appears that *Gruntz* allows a state court to proceed and enter final judgments or orders, if the state court is within an exception to the automatic stay. Ultimately a party may request that the bankruptcy court review the matter to determine whether the state court has proceeded within an exception.

What is a tragedy to this Court is that so much time, effort, and expense have been devoted to matter that this Court essentially set for hearing on an expedited basis as soon as it learned of the July 13, 2001 Minute Entry Order and which was resolved by this Court in a week. Appeals have followed, and this Decision will only result in further appeals. The Plaintiff and Defendant Sternberg have incurred presumably substantial attorneys' fees and costs on a matter resolved in a week. At this point, the parties have so much invested in this matter, they will not stop.

The parties to this dispute profoundly disagree as to whether Defendant Sternberg violated or willfully violated the automatic stay. Because of this disagreement, Defendant Sternberg chose not to present any evidence at the time of the remand trial. His counsel took the position that Defendant Sternberg acted within an exception to the automatic stay, that this Court was incorrect to conclude that any violation of the automatic stay had occurred even if that conclusion was that only the State Court had acted, and

that the Arizona District Court was incorrect to conclude that Defendant Sternberg's failure to act affirmatively to rescind the July 13, 2001 Minute Entry Order or to stay the State Court proceedings was a willful violation of the automatic stay by Defendant Sternberg. Defendant Sternberg did not present any evidence on any affirmative defense such as estoppel or waiver. Defendant Sternberg did argue that this Court should not reach certain issues outlined herein, because of a law case argument or that the Plaintiff was barred from an evidentiary standpoint from presenting certain evidence. The Court will consider these issues in its Decision.

A. Whether the Plaintiff is entitled to damages for being unable to expend the usual billable hours for his major client.

As noted previously, Johnston has shown damages in the amount of $2,883.20, which related to his inability to practice law for his major client for the limited period of time from July 16 through July 19 and for July 24 and July 25. Defendant Sternberg argues that the presentation of such evidence at a trial on remand is improper, since the Plaintiff had rested his case at the first trial.

At the first trial, this Court concluded that the Plaintiff's testimony was ambiguous or confusing on the issue of what damages, if any, he had incurred because of his inability to practice law. At the remand

trial, the Plaintiff did review his time records, and they were compared with his billable hours after he filed his bankruptcy petition. The Plaintiff argues that since this matter was remanded, the Plaintiff is entitled to revisit all evidence presented or not presented o the issue of damages. This Court granted Defendant Sternberg a directed verdict on the issue whether he had violated the stay at the first trial. Although the Plaintiff had chosen to present some evidence on the damages incurred by the Plaintiff at the first trial, this Court did not focus on damages at that time. Since the District Court concluded that Defendant Sternberg had committed a willful violation of the stay and remanded this matter for this Court to consider any affirmative defenses that Defendant Sternberg might have and to consider the damages incurred by the Plaintiff, the Court believes that it must reopen the evidence and allow the Plaintiff's testimony as to the loss of compensation for the limited period of time in July 2001.

Moreover, the Plaintiff would not have lost these billable hours but for the inaction of Defendant Sternberg. The District Court has concluded that Defendant Sternberg was required to take some affirmative action, such as vacating the Minute Entry Order of the State Court or requesting a stay of the State Court proceedings. Since Defendant Sternberg did not take any affirmative action, the Plaintiff was required to cease billing his major client and devote his time to preparing pleadings for a special action to the Arizona Appellate Court. Defendant Sternberg's

inaction was the proximate cause of the Plaintiff's inability to bill his major client at the usual hourly rate for a reasonable number of hours. Thus, the Plaintiff has now shown damages in the amount of $2,883.20 for his inability to work for a limited period of time, which were caused by Defendant Sternberg's willful violation of the stay.

B. Whether the Plaintiff is entitled to an award of his attorneys' fees.

At the initial trial, the Plaintiff failed to list his counsel as a witness and counsel's fee applications as an exhibit or exhibits in the joint pretrial statement. Defendant Sternberg objected to the admission of such evidence, noting that he had been unable to do any discovery on the matter. This Court agreed that exploring such evidence at the time would be prejudicial to Defendant Sternberg. This Court also determined that the Plaintiff had shown no willful violation of the stay, as a part of its prima facie case; therefore, attorneys' fees were not warranted under Section 362(h). As noted, the District Court has concluded that Defendant Sternberg committed a willful violation of the stay by his failure to take affirmative action. Given such a determination, this Court believes that it must now consider the attorneys' fees and costs incurred by the Plaintiff's counsel.

11 U.S.C. §362(h) (West 2005)[20] [sic] provides, in pertinent part, "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The Ninth Circuit Decision of *In re Bloom*, 875 F.2d 224 (9th Cir. 1989) is also illustrative on this point. The Court held that for purposes of 362(h):

> A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.

Id. at 227.

The Ninth Circuit Decision of *Dawson v. Washington Mutual Bank (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004), allows this Court to determine whether the time expended by Plaintiff's counsel was reasonable and whether the hourly rate was reasonable. *Id.* at 1152.[21] However, *Dawson* also noted that a

---

[20] [sic] This section has been redesignated under the new Act. It is now currently set forth at 11 U.S.C. § 362(k)(1).

[21] The Bankruptcy Court in *Dawson* reduced the fees to be awarded to debtor's counsel, noting that counsel's request was "grossly disproportionate to the cost of litigating the issue in question." *Id.* The Bankruptcy Court reduced the fees of debtor's counsel by 1/20, stating that the debtor and counsel had only been successful on one of twenty issues presented. *Id.*

recalculation of fees might be appropriate, since certain matters had been remanded. *Id.* Based upon the guidance provided by *Dawson*, this Court believes that it must consider the time expended by the Plaintiff's counsel during the time period from July 13, 2001 through July 31, 2001, when the Plaintiff's counsel was attempting to have, *inter alia*, Defendant Sternberg vacate the Minute Entry Order, and the time incurred on appeal, since the District Court has concluded that Defendant Sternberg willfully violated the stay. This Court may consider whether the Plaintiff's counsel expended a reasonable amount of time on the matters and whether counsel's hourly rate is reasonable.

The Court has set forth in detail in this Decision which attorneys' fees of the Plaintiff's counsel may be properly charged against Defendant Sternberg. Based upon the analysis and Exhibits A through D attached hereto, Plaintiff's counsel shall be entitled to an award of $69,986. (Total fees of $41,213.50 set out in FN39 minus disallowed fees of $12,062.50 = $29,151; Exhibit A – total fees of $21,726 minus disallowed fees of $8,356 = $13,370; Exhibit B – total fees of $21,002 minus disallowed fees of $2,163 = $18,839; Exhibit C – total fees of $5,580 minus disallowed fees of $315 = $5265; Exhibit D – total fees of $4,954.50 minus disallowed fees of $283.50 = $4671; Plus other disallowed fees of $397.50 from Pages 10 and 11 of the Decision and $912.50 from Pages 11 and 12 of the Decision.) ($29,151 + $13,370 + $18,839 + $5265 + 4671 minus $397.50 minus $912.50 equals $69,986.)

C. Whether the Plaintiff may recover against Defendant Sternberg for emotional distress. If so, what are the amount of the damages that Plaintiff may recover?

Defendant Sternberg advances the argument that the law of the case or some type of estoppel argument should preclude this Court from considering this claim. The Court has already addressed this issue as a part of the pre-trial and trial proceedings on the remand issue. However, during the course of these proceedings, while the parties were appealing this Court's Decision on Defendant Sternberg's request for a directed verdict, the law of the Ninth Circuit changed on the issue of emotional distress damages. A review of Ninth Circuit law requires that upon remand, this Court must consider the change in law as a part of the remand process. When a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court, unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different. *Waggoner v. Dallaire*, 767 F.2d 589 (9th Cir. 1985); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995); *U.S. v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000).

In excluding the evidence on the issue of emotional distress, this Court relied on a decision which

has since been rescinded by the Ninth Circuit and is of no force and effect. In essence, the foundation for this Court's ruling was changed by the new published opinion in the *Dawson* case. An intervening change in the law requires that this Court reexamine its prior ruling and now allow the Plaintiff to assert a claim for emotional distress. Having determined this preliminary matter, this Court will now turn to the substance of the issues presented for such a claim.

The Ninth Circuit Decision of *Dawson* determined that a debtor's claim for emotional distress was a cognizable claim to be considered by the Bankruptcy Court, stating

> Reading the legislative history as a whole, we are convinced that Congress was concerned not only with financial loss, but also – at least in part – with the emotional and psychological toll that a violation of a stay can exact from an individual. Because Congress meant for the automatic stay to protect more than financial interests, it makes sense to conclude that harm done to those non-financial interest by a violation are cognizable as 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay,. . . . 11 U.S.C. §362(h), include damages for emotional distress.

Id. at 1148. The Circuit also concluded that there was a possibility of "frivolous claims," and wanted to limit the foregoing. Therefore, to be entitled to damages for an emotional distress claim, the debtor must

"(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm, and the violation of the automatic stay . . . " *Id.* at 1149. "Fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm. (Citation omitted.)" *Id.* The Ninth Circuit concluded that there were a number of ways, from an evidentiary standpoint, to show such harm. The debtor could (1) present corroborating medical evidence,[22] (2) have non-experts, such as family members, friends, or co-workers, testify as to the "manifestations of mental anguish and clearly establish that significant emotional harm occurred,"[23] or (3) simply rely on the fact that the emotional distress was readily apparent.[24] *Id.* at 1149-50. Under the third proof as to the presentation of evidence, the Ninth Circuit opined that even if the violation of the stay were not egregious, the very circumstances might make it obvious that a reasonable person would suffer significant harm.[25] *Id.* at 1150. Even if significant harm had been clearly established, the debtor must also show that there was a nexus between the claimed damages and the violation of the

---

[22] *In re Briggs*, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992).

[23] *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 821-22 (1st Cir. BAP 2002).

[24] *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987).

[25] *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995).

stay. Such a casual connection must be clearly established or readily apparent. *Id.*

This Court concludes that Defendant Sternberg's failure to take affirmative action, given the unique facts of this case, was not egregious. Defendant Sternberg was essentially out of the office when the Plaintiff filed his special action with the State Appellate Court. The position advanced by his firm, while he was away, was not frivolous. Indeed there was support for Defendant Sternberg's actions which this Court has extensively reviewed and discussed in its prior Decision on Defendant Sternberg's request for a directed verdict. Moreover, the time period involved concerning the failure to take affirmative action was brief. The Minute Entry Order was entered by the State Court on July 13, 2001, which was a surprise to all parties, including Defendant Sternberg. By July 31, 2001, this Court had noticed, conducted a hearing on, and vacated the Minute Entry Order as a violation of the automatic stay. Any damages incurred after that date have been by Plaintiff's counsel, mostly attorneys' fees incurred by him on appeal, to vindicate Plaintiff's position that Defendant Sternberg willfully violated the stay by his failure to take affirmative action to rescind the Minute Entry Order or to request a stay of the State Court proceedings.

Although Defendant's [sic] Sternberg's action, or inaction, was not an egregious violation of the stay, this Court concludes that the Plaintiff has clearly shown a significant harm to himself. The threat of

the Plaintiff being incarcerated by August 1, 2001, since he did not have bankruptcy estate or non-estate assets to pay a substantial arrearage to his ex-wife as ordered in the State Court Minute Entry Order, the concomitant with the fear that he would lose his major client and his law practice if he were incarcerated, would obviously cause even a reasonable person to suffer significant emotional harm. Given that the District Court has concluded that Defendant Sternberg willfully violated the stay by his failure to take affirmative action, this Court must conclude that the Plaintiff has established a claim for emotional distress damages.

It is also clear that Defendant Sternberg's failure to take affirmative action, based upon the facts of this case, led to the Plaintiff's injury. The causal link between Defendant Sternberg's failure to have the Minute Entry Order rescinded, or to request that the State Court action be stayed, and the harm to the Plaintiff is readily apparent. Hence, the Plaintiff is entitled to damages for the emotional distress that he suffered.

The Plaintiff did not specify the amount of damages to which he would be entitled. However, the Ninth Circuit relied, in part, on the Decision of *In re Flynn*, for concluding that damages would be awarded for a stay violation that was not egregious and brief in nature. In the *Flynn* case, the debtor received an award of $5,000 for emotional distress damages because the financial institution's placing a hold on, or freezing, her deposit account resulted in

her having to cancel her son's birthday party. *In re Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995). Given the severe nature of the harm that was suffered by the Plaintiff in this case, and based upon the District Court's finding of a willful violation of the stay by Defendant Sternberg, this Court concludes that the Plaintiff should recover $20,000 (roughly four times the amount that the debtor received to cancel a birthday party) as damages for the emotional distress that he suffered.

V. CONCLUSION

Based upon the foregoing, the Court has considered the issues referred to it as a result of the remand by the Arizona Federal District Court. The Court has considered the various affirmative defenses advanced by Defendant Sternberg in this Decision. The Court has also considered to what extent the attorneys' fees and costs requested by Plaintiff's counsel should actually be charged against Defendant Sternberg as a result of the Arizona Federal District Court having found that Defendant Sternberg willfully violated the stay. The Court, based upon a change in the Ninth Circuit case law has also allowed the Plaintiff to assert a claim for emotional distress.

As far as the actual damages that the Plaintiff shall receive as a result of Defendant Sternberg's willful violation of the stay, he is entitled to damages for being unable to expend the usual billable hours on his major client in the amount of $2,883.20. The

Plaintiff is also entitled to attorneys' fees and costs in the amount of $69,986; and he is entitled to receive the amount of $20,000 as damages for emotional distress.

DATED this 31th [sic] day of March, 2006.

/s/ Sarah Sharer Curley
Honorable
Sarah Sharer Curley
U. S. Bankruptcy Judge

Exhibit A through D attached.
BNC to Notice

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE GEORGE E. DAWSON AND BARBARA J. DAWSON, Debtors.	
GEORGE E. DAWSON and BARBARA J. DAWSON, Plaintiffs-Appellants, v. WASHINGTON MUTUAL BANK, F.A., Successor to Great Western Bank, Defendant/Appellee.	No. 02-16903

MOTION TO INFORM THE COURT OF THE POSITION OF THE UNITED STATES

The United States submits this motion to inform the Court that (1) it supports the petition for rehearing en banc submitted by the Appellee, Washington Mutual Bank, in this matter, and (2) the Solicitor General has authorized filing of an amicus brief supporting the Appellee if the Court grants rehearing en banc.

The Appellee has filed with this Court a motion requesting the Court to take judicial notice of the amicus brief that the United States filed in *Stinson* v. *Cook, Perkiss & Lew, APC, et al. (In re Stinson)*, Nos. 03-16339 & 03-16559. By order of January 4, 2005,

the Court granted that motion. The Appellee's petition for rehearing en banc is consistent with the position that the United States has taken before this Court in its amicus brief in *Stinson*, and the United States supports the granting of the Appellee's petition. If the petition is granted, the Solicitor General has authorized the United States to file an amicus brief in support of the Appellee.

The Court has already granted the Appellee's motion for judicial notice of the government's *Stinson* brief, and we are submitting with this motion sufficient copies of that brief for distribution to the full Court.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

/s/ William Kanter/ by [Illegible]
WILLIAM KANTER
(202) 514-4575

/s/ Irene M. Solet
IRENE M. SOLET
(202) 514-3542
Attorneys, Appellate Staff
Civil Division, Room 7214
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JANUARY 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of January, 2005, I caused two copies of the foregoing Motion To Inform The Court Of The Position Of The United States to be served on each of the following counsel by FedEx Next-Business Day Delivery:

A. Charles Dell'Ario
Law Office of A. Charles Dell'Ario, APC
201 19th Street, Suite 200
Oakland, CA 94612
telephone: 510/763-7700

William G. Malcolm (primary contact)
Malcolm & Cisneros
2112 Business Center Drive, Second Floor
Irvine, CA 92612
telephone: 949/252-0400

I also certify that this same day I caused to be sent via FedEx next-business-day delivery an original and 50 copies of the foregoing Motion To Inform The Court Of The Position Of The United States to the Clerk of the Court for filing.

/s/ Irene M. Solet
IRENE M. SOLET

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

> **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> **(2)** the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> **(3)** any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . .
>
> **(6)** any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . .

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

. . .

(2) under subsection (a) –

(A) of the commencement or continuation of a civil action or proceeding –

. . .

(ii) for the establishment or modification of an order for domestic support obligations;

. . .

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(k) (1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

Case Name and Citation	Standard applied	Creditor and type of conduct	Evidence of damages	Amount awarded or other disposition
Eleventh Circuit				
In re Diaz, 2009 WL 3584517 (Bankr. M.D. Fla. Sept. 30, 2009)	*Dawson II*	State taxing and social services agencies sent 2 collection notices threatening driver's license and car registration suspensions and report to credit reporting agencies – additional violations of discharge injunction	Unclear whether any evidence presented, or if court simply presumed that "emotional distress," "aggravation," and "inconvenience" were established	$500 for stay violations; $29,000 for discharge injunction violations – award includes amounts for "inconvenience"
In re Noland, 2009 WL 4758651 (Bankr. N.D. Ala. Dec. 7, 2009)	Cites *In re Caffey*, 384 B.R. 297 (Bankr. S.D. Ala 2008), which applies *Dawson II*	Bank disputed stay applicability and instituted foreclosure proceedings	Debtors testified to missing work, sleepless nights, embarrassment	$3,000.00 to each debtor because "readily apparent" that fear of losing house would cause emotional distress
In re Comoletti, 2009 WL 4267343 (Bankr. M.D. Fla. 2009)	*Dawson II*	Individual - foreclosure action	Unclear who testified to emotional distress, aggravation, and inconvenience	$250.00 because "readily apparent" a reasonable person would suffer emotional distress
In re Byrd, 2009	Cites *In re Caffey*,	Medical services company -	Debtor testified that he	$2,000.00

WL 385571 (Bankr. N.D. Ala. Feb. 5, 2009) (unpublished)	384 B.R. 297 (Bankr. S.D. Ala. 2008), which applied *Dawson II*	telephone calls and letters	and his wife had "much emotional distress and worry"	
In re Swilling, 2008 WL 4999090 (Bankr. M.D. Ala. Nov. 20, 2008)	Unclear - cites *Aiello* and notes that debtor also suffered financial injury	Consumer lender - refused to turn over money until debt paid	Debtor testified to stress and could not eat	$5,000
In re Spinner, 398 B.R. 84 (Bankr. N.D. Ga. 2008)	*Dawson II* and *Fleet Mortgage*	Pawn shop – dispute over stay applicability	Debtor testified to inability to be around co-workers or to eat, difficulty with blood pressure so "trouble working" for one month	$2356.70 – an amount equal to one month's salary
In re Caffey, 384 B.R. 297 (Bankr. S.D. Ala. 2008)	*Dawson II* and *Fleet Mortgage*	Individual and her lawyers – continued suit for child support arrearages resulting in incarceration	Debtor testified to a history of anxiety, and emotional distress and embarrassment	$5,000
In re Hodge, 367 B.R. 843 (Bankr. M.D. Ala. 2007)	*Aiello*	Payday loan company	Debtor testified to being "apprehensive fearing arrest" the next day at work	None
In re Parker, 2007 WL 1889958 (Bankr. M.D. Ala. June 28, 2007)	*Aiello*	Vehicle financing company – mistake when stay lifted to allow repossession of vehicle, and creditor also attempted to garnish wages	Debtor and her mother testified to sleeplessness, loss of appetite, nervousness, and withdrawal from	$500

		and sue to collect debt	her two small children for over three weeks	
In re Hutchings, 348 B.R. 847 (Bankr. N.D. Ala. 2006)	Cites both *Dawson* and *Aiello*	Mortgage company – mistake about stay relief order telephone calls and dunning letters	Debtor never claimed emotional distress damages, but court addressed argument	None
In re Han, 333 B.R. 881 (Bankr. N.D. Fla. 2005)	*Aiello*	Small business financing company – mistake which court found egregious conduct	Debtor stated that he suffered emotional distress – court found Debtor was "clearly upset," but no public embarrassment	None
In re Baird, 319 B.R. 686 (Bankr. M.D. Ala 2004)	General standard that damages must be based on more than speculation and proven with reasonable certainty	IRS – mistake re conditional dismissal order – notice of intent to levy, and offset of overpayment against taxes owed	Stipulated facts, which did not include any evidence of alleged emotional distress	None
In re Hedemeimi, 297 B.R. 837, 842 (Bankr. M.D. Fla 2003)	Cited district court opinion in *Aiello*	Bank - mistake re debtor check cashing	Debtor testified that she suffered embarrassment and humiliation	None - not an egregious violation; no corroborating testimony
In re Bishop, 296 B.R. 890 (Bankr. S.D. Ga. 2003)	Medical testimony not required - damages "readily apparent" and "no doubt" suffered	Bank repo agent repossession of truck	Unclear who testified to fear, anguish, and personal humiliation over threat of incarceration	$5,000.00
In re Smith, 296	*Fleet Mortgage*	Mobile home finance	Debtor testified to	$25,000 - award

B.R. 46 (Bankr. M.D. Ala. 2003)		company - repossessed mobile home with debtor still in it, and destroying many possessions, including photographs of dead son	becoming homeless, losing job, suffering stress and depression, receiving psychiatric treatment, medication	includes lost wages
In re Bryant, 294 B.R. 791 (Bankr. S.D. Ala. 2002)	*Aiello*	IRS – letters and telephone calls	Debtor testified that nervous and "totally upset," cried; contacts affected ability to eat and sleep, and exacerbated an acid reflux problem	None – injury too slight
In re Parker, 279 B.R. 596 (Bankr. S.D. Ala. 2002)	*Aiello*	IRS – mistake: employee coded business bankruptcy, but not individual guarantors' bankruptcy – notices of intent to levy, service of levy on former employer	Debtor wife testified embarrassed, irritable, which affected her job performance – Debtor testified to difficulty sleeping, upset, worried, afraid to get mail, marital difficulties –preexisting medical condition worsened and had to go to the doctor	None – insufficient evidence
In re Headrick, 285 B.R. 540 (Bankr. S.D. Ga. 2001)	No standard cited	Georgia Department of Revenue - sent demands for payment of taxes threatening collection	Debtor wife testified to "emotional distress," her husband became extremely angry and she was upset	$200

In re Poole, 242 B.R. 104 (Bankr. N.D. Ga. 1999)	Discharge injunction case, but applied automatic stay precedent - medical testimony not required	Vehicle leasing company - mistake handling bankruptcy notice - continued with lawsuit, judgment, wage garnishment	Debtors testified to humiliation and stigmatization (incl. loss of free tickets to entertainment events), and that wife went to psychological therapist	$1,200
In re Davis, 201 B.R. 835 (Bankr. S.D. Ala. 1996)	Unclear - notes that some courts require medical evidence, but relies only on one debtor's testimony	IRS - mistake in notating bankruptcy in computer - sent dunning letters, and levied on bank account	Debtor wife testified to inconvenience, humiliation, and embarrassment because the debtors bounced checks to merchants	$300 - 150% of out of pocket costs
In re Rollins, 200 B.R. 427 (Bankr. N.D. Ga. 1996), *reversed on other grounds*, 243 B.R. 540 (N.D. Ga. 1997)	Standard unclear – court found actions not egregious or malicious	County officials – dispute over applicability of stay	Debtor testified to "emotional and other stress related matters"	$230
In re Flynn, 185 B.R. 89 (S.D. Ga. 1995)	No requirement of medical evidence because it was "clear" that debtor suffered emotional harm - debtor's testimony was sufficient	IRS - mistake - levy on bank account, which caused account to be frozen	Debtor testified embarrassed because stopped in supermarket checkout line due to bounced check, and she had to cancel son's birthday party	$5,000

In re Matthews, 184 B.R. 594 (Bankr. S.D. Ala. 1995)	Standard unclear – "mental anguish" was enough – "although not quantified in actual dollars, the proof showed damage was done"	IRS – levy notices, seizure of tax refunds – IRS alleged computer error, mistake, and good intentions, which court rejected because conduct took place over two years	Debtors testified that wife quit job due to stress; debtors vomited and cried; children were upset	$3,000
In re Washington, 172 B.R. 415 (Bankr. S.D. Ga. 1994), *abrogated on other grounds as stated in In re Martinez*, 196 B.R. 225 (D.P.R. 1996)	Most prove that distress goes beyond "fleeting and inconsequential"	IRS - attempted wage garnishment - mistake - system could not keep track of bankruptcy information when debtor was not the first party listed on a joint tax return	Debtor testified that she was embarrassed and upset and had to find other employment because her employer began treating her differently	None - distress was fleeting and inconsequential
Tenth Circuit				
In re Payne, 387 B.R. 614 (Bankr. D. Kan. 2008)	No standard cited	Mortgage companies – mistakes in applying payments, including disallowed fees in payoff letters; failure to notify debtors of escrow deficiencies; assessed inspection fees without notice or cause	Debtor testified to incurring $500 in medical bills due to emotional distress	$500
In re Diviney, 211 B.R. 951	Unclear – cites *In re Flynn*, 169 B.R. 1007	Bank – repossessed debtor's vehicle – heated	Debtor alleged humiliation, anguish,	None

(Bankr. N.D. Okla. 1997), *abrogated on other grounds by In re Johnson*, 501 F.3d 1163 (10th Cir. 2007)	(Bankr. S.D. Ga. 1994), and *In re Carrigan*, 109 B.R. 167 (Bankr. W.D.N.C. 1989) but says they involved a clearer showing of emotional distress	conversation and profanity was used – dispute over stay applicability due to dismissal and reinstatement of case	duress	
In re Gagliardi, 290 B.R. 808 (Bankr. D. Colo. 2002)	Fleeting and unsubstantiated stress noncompensable - must have medical evidence or otherwise quantify injuries	Mortgage company - eviction (foreclosure was prepetition)	Debtor testified to apprehension and stress, loss of weight and sleep	None
In re Suarez, 149 B.R. 193 (Bankr. D.N.M. 1993)	Unclear – just notes lack of evidence	Individual – dispute over applicability of stay – wage garnishment	Unclear whether debtor testified to "anguish and embarrassment"	none – no evidence presented
Ninth Circuit				
In re Urwin, 2010 WL 457737 (Bankr. D. Idaho Feb. 2, 2010)	*Dawson II*	Attorney – failed to take all steps to correct state court order violation of stay	Debtor did not testify – only alleged emotional distress in papers	None – no evidence
In re Calloway, 2009 WL 1564207 (Bankr. D. Ariz. May 26, 2009)	*Dawson II*	Auto sale company – Repossession of car	Debtor testified to humiliation	$2,000 (compared to *Flynn*)

In re Grand, 2009 WL 790205 (Bankr. D. Hawaii Jan. 23, 2009)	*Dawson II* – but also says that debtor must show that emotional distress lasted for a significant period of time, or meaningfully interfered with normal life	Mortgage company – "jumped the gun" by changing lock on debtor's house 8 days early (debtor intended to surrender collateral)	Debtor testified she was afraid a burglar was in the house, was angry, and very upset	None – no proof lasting effect, interference with life, that distress caused by the stay violation or "entire situation"
In re Werner, 2008 WL 5054345 (Bankr. E.D. Cal. Nov. 28, 2008)	*Dawson II*	US Department of Veteran's Affairs – failed to refund intercepted amounts	Debtor declaration re had to cancel a trip	None
In re Hernandez, 2008 WL 84556 (Bankr. E.D. Wash. Jan. 4, 2008)	Standard not stated	Creditor unclear - continued to call and send letters many times, after being told of bankruptcy	Unclear who testified - creditor's actions "greatly upset [the debtor], and caused him emotional distress"	$3,500
In re McLaughlin, 2007 WL 3229166 (Bankr. D. Ariz. Oct. 30, 2007)	*Dawson II*, with specific reference to *In re Flynn*, 185 B.R. 89 (S.D. Ga. 1995), which was cited with approval in *Dawson II*, as to amount of damages	Vehicle financing company – telephone calls, threats of incarceration and repossession of vehicle	Debtors both testified to sleepless nights, fear of arrest, severe cramps chest pains, and mental anguish prevented focus on work, which caused him to lose a supervisory position	$3,000 to each debtor
In re White, 2007 WL	*Dawson II*	Auto seller – failed to return vehicles repossessed	Debtor testified to headaches for which	$2,000

2023490 (Bankr. D. Ariz. July 9, 2007)		without knowledge of bankruptcy	medicine prescribed; worsened anxiety disorder; concern that daughter may lose job without vehicles	
In re Caldwell, 2006 WL 3541931 (Bankr. D. Or. Dec. 7, 2006)	*Dawson II*	Furniture store – failed to quash arrest warrant issued for failure to appear at debtor's exam	Debtor and family testified to panic attacks, inability travel more than short distances, inability to remain at home by herself, claustrophobia	$50,000 for cost of continued psychiatric treatment and emotional distress
In re Dayley, 349 B.R. 825 (Bankr. D. Idaho 2006)	*Dawson II*	Creditor sent three computer-generated billing statements out – computer error; computer had been programmed to stop sending statements	Debtor husband testified that wife's blood sugar dropped	None b/c did not prove anything more than being "temporarily upset" – insignificant
In re Kinsey, 349 B.R. 48 (Bankr. D. Idaho 2006)	*Dawson II*	Collection agency – mistake; process served	Debtor affidavit greatly humiliated and embarrassed by being served at his workplace, which caused "great hardship, mental anguish, and distress"	None – no competent evidence on damages, even though court could presume embarrassment occurred
In re Corringe, 348 B.R. 789 (Bankr. D. Idaho	*Dawson II*	Collection agency – mistake; collection letter and instructed sheriff to garnish	Debtor worried he would not be able to purchase Christmas	None – emotional distress not

2006)		bank account	gifts for children	readily apparent
In re Ozenne, 337 B.R. 214 (9th Cir. BAP 2006)	*Dawson II*	Storage unit operator – dispute over applicability of stay	BAP remanded because debtor had stated he suffered depression after the sale	Remanded
In re Feldmeier, 335 B.R. 807 (Bankr. D. Or. 2005)	Discharge injunction case – applies *Dawson II*	Law firm - left phone message with debtor's mother threatening criminal charges and sent letter seeking payment of debt	Debtor husband and wife testified to distraught, upset, and frightened; worried that coworkers would find out and she would become embarrassed	$10,000
In re Kaufman, 315 B.R. 858 (Bankr. N.D. Cal 2004)	Applied *Dawson I*, so this part of the case overruled by *Dawson II*	Mortgage lender and auction house – sold debtor's personal belongings to enforce storage lien	Not discussed	None
Eighth Circuit				
In re Anderson, 2010 WL 1490059 (Bankr. S.D. Iowa Apr. 13, 2009)	*Dawson II*	Bank – phone calls and written messages to collect credit card debt - Bank claimed computer error	Debtor testified to anxious, irritable, trouble sleeping – no medical treatment, but increased symptoms of precursor to Parkinson's disease	$1,000.00
In re L'Heureux, 322 B.R. 407 (8th Cir. BAP 2005)	*Dawson II*	Private lender - failure to remove notice of foreclosure sale after cancelling sale	Debtor testified to "illness, emotional distress and medical expenses"	None
In re Jackson,	Unclear – but rejects	Furniture company –	Debtor testified to	$1.00 because no

309 B.R. 33 (Bankr. W.D. Mo. 2004)	*Aiello* – no requirement of medical or expert testimony – Debtor's own testimony may be enough	repeated house visits and calls threatening repossession of furniture	being "upset" and "embarrassed"	physical injury or medical treatment, or corroborating testimony
Rosengren v. GMAC Mortgage Corp., 2001 WL 1149478 (D. Minn Aug. 7, 2001)	Must be more than fleeting, inconsequential, medically insignificant – cites to state law case re need for physical distress	Mortgage lender – calls pressuring debtor to bring account current	Unclear whether debtor testified to "embarrassment due to his need to borrow money from his family to meet [creditor's] harassing directives"	None – distress was fleeting, inconsequential, and medically insignificant
In re McPeck, 1991 WL 8405 (Bankr. D. Minn. Jan. 29, 1991)	Unclear – "I cannot put a price on any distress the telephone calls may have caused [the debtor]"	IRS – apparently mistaken - telephone calls requesting payment of debt	Unclear	None
In re Crispell, 73 B.R. 375 (Bankr. E.D. Mo. 1987)	Must be more than "fleeting, inconsequential, or medically insignificant" – damages available	Bank froze account and executed setoff – due to "oversight"	Unclear testimony regarding "embarrassment" – debtor husband testified he did not lose any sleep over violation	None – suffered embarrassment, but no medical treatment required
In re Mercer, 48 B.R. 562 (Bankr. D. Minn 1985)	Standard not stated – court found conduct egregious when awarding punitive damages	Equipment rent-to-own company – went to house twice to repossess stereo, frightening children before actually repossessing	Unclear who testified to debtor being humiliated, embarrassed, anxious, and frustrated	$1000

Seventh Circuit				
In re Jefferson, 2008 WL 4846305 (Bankr. C.D. Ill. Nov. 7, 2008)	Discharge injunction case – court applies *Aiello*	Company providing medical services – three dunning letters	None described	None
In re Thompson, 2008 WL 542610 (Bankr. S.D. Ind. Feb. 22, 2008)	*Aiello*	Opinion does not provide specifics	No evidence presented - motion to dismiss	Motion to dismiss denied b/c debtor alleged financial harm in addition to emotional distress
In re Dailey, 2007 WL 4531804 (Bankr. C.D. Ill. Dec. 18, 2007)	*Aiello*	Bank/credit card company – sued debtor to recover debt	None described	None
In re Welch, 296 B.R. 170 (Bankr. C.D. Ill. 2003)	*Aiello*	Institutional lender - wage garnishment	Debtors testified to difficulty paying power bill	None
In re Baggs, 283 B.R. 726 (Bankr. C.D. Ill. 2003)	*Aiello*	Auto dealership – sent 2 letters with veiled threats of criminal prosecution	Debtor testified to being shocked and upset	None
In re Calvillo, 2002 WL 32001416 (Bankr. C.D. Ill. May 16, 2002)	*Aiello*	Telephone company – dunning letters and telephone calls	Debtor testified of emotional distress	None

In re Shade, 261 B.R. 213 (Bankr. C.D. Ill 2001)	*Aiello*	Financing company - demanded payment of debt	Debtor cried and too shaken up to leave the courthouse on her own and had to be escorted by her attorney	None
Sixth Circuit				
In re Cousins, 404 B.R. 281 (Bankr. S.D. Ohio 2009)	Notes circuit split and alternative of *Harchar* - does not decide standard, but has to be more than fleeting and inconsequential	Mortgage company - sent account statement with payment coupon - dispute over stay applicability	Debtor alleged "distraught"	Motion to dismiss denied
In re Moore, 2009 WL 1616019 (Bankr. N.D. Ohio Mar. 20, 2009)	Cites *Harchar* - actual damages "does not include intangible damages for emotional distress"	Ex-spouse maintained domestic relations suit and filed a motion in separate suit to require payment by debtor's company	Evidence not discussed	Motion to dismiss – denied
In re Parks, 2008 WL 2003163 (Bankr. N.D. Ohio May 6, 2008) (unpublished)	*Harchar* - emotional distress damages not available - strong corroborating evidence in the absence of unusual circumstances	Gas company - demanded payment of prepetition debt before restoring gas service	Debtor affidavit of grief and fright when a pillow caught fire because debtor was forced to use space heaters	None b/c not available
In re Pawlowicz, 337 B.R. 640 (Bankr. N.D. Ohio 2005)	Cites *Aiello* and *Harchar*, availability of emotional distress damages is "serious	Pawnbroker – caused items held by it to be forfeited	Debtors testified to sentimental value of property they pawned	None

	question" – need strong corroborating evidence, usually in the form of medical evidence			
In re Harchar, 331 B.R. 720 (N.D. Ohio 2005)	Follows neither *Aiello* nor *Dawson II*, but holds that emotional distress damages are never available under 362([h])	IRS - "freeze code" on tax refunds	Debtor testified to mental anguish, impairment of the enjoyment of life, pain and suffering, loss of consortium, marital difficulties	None
In re Skeen, 248 B.R. 321 (Bankr. E.D. Tenn. 2000)	Must be more than fleeting, inconsequential, medically insignificant, suggests debtor must have sought medical treatment or been "incapable of going about daily routine"	Financing company – telephone calls	Debtor testified to being nervous, shaken, crying, and "torn up" after phone calls	None
In re Meis-Nachtrab, 190 B.R. 302 (Bankr. N.D. Ohio 1995)	Damages must generally be based on more than conjecture	Debtor's former domestic relations counsel – sent bills to Debtor and refused to return amounts paid on the bills	Debtor testified to being "stressed out," "nervous," and "nauseous"	None
In re McGee, 181 B.R. 307 (Bankr. N.D.	Standard not stated	Bank - collection phone calls	Unclear source of evidence - award was for "embarrassment	$350

Ohio 1995)			and aggravation"	
In re Briggs, 143 B.R. 438 (Bankr. E.D. Mich. 1992)	Debtor may be awarded emotional distress damages "to the extent actual injury proved;" damages must be proven by "specific and definite evidence"	Credit union – told debtor he had to take the initiative to terminate automatic loan payments	Debtor testified to "anguish" and "trauma"	None – Debtor's own vague and conclusory testimony is not "specific and definite evidence"
In re Bennet, 135 B.R. 72 (Bankr. S.D. Ohio 1992)	Standard not stated	Bank – repossessed car by mistake	Unclear if evidence on "humiliation"	None
In re Jacobs, 100 B.R. 357 (Bankr. S.D. Ohio 1989)	Unclear standard – notes that violation was "egregious"	Credit card company – repeated letters and telephone calls	Debtor testified to "great embarrassment" because telephone messages when guests visiting	$200
Fifth Circuit				
In re Collier, 410 B.R. 464 (Bankr. E.D. Tex. 2009)	*Repine* left question open, but emotional distress damages available – must be more than "fleeting, inconsequential, and medically insignificant" – no requirement of corroborating or	Individual – demand letter and posted sign saying "BRAD COLLIER OWES ME $984.23 WILL YOU PLEASE COME PAY ME!"	Debtor testified he was ridiculed, compelled to keep low profile, – headaches, sleep deprivation, fatigue - Debtor's ex-wife and son corroborated irritability – someone testified to medical treatment for rash	$1,500

	medical testimony if testimony is "particularized and extensive enough" – no award available for mere anger or embarrassment		attributed to stress and that acid reflux medicine was doubled	
In re Morris, 2008 WL 4949892 (Bankr. N.D. Tex. Nov. 19, 2008)	Unclear standard - debtor did not put on "credible evidence of . . . emotional distress damages"	Individual and his attorney - continued to prosecute domestic relations action seeking monetary damages, liens, turnover, and charge against wages - argued that debtor could be incarcerated	Not discussed	None
In re Towery, 2006 WL 6510437 (N.D. Tex. Mar. 24, 2006)	*Fleet Mortgage*, bankruptcy and tort cases stating that prima facie case requires intentional or reckless act, extreme and outrageous conduct, causation and severe distress	Mortgage servicer - letters, notice of foreclosure, actual foreclosure	Unclear, but seems debtor testified to being unable to sleep, crying and being depressed	$25,000 (includes all actual damages, including increased taxes and wear and tear on vehicle)
Fourth Circuit				
In re Newcomer, 416 B.R. 166 (Bankr. D. Md. 2009)	Standard unclear - court states that actual damages under 362([h]) would be	Mortgage company - letters threatening foreclosure, misapplication of plan payments	Debtor testified to loss of sleep, being irritable, marital difficulties, impact on self-esteem,	None

	proven at trial, but analyzes intentional infliction of emotional distress claim under Maryland law		having to work harder, and seeing a physician	
In re Weatherford, 413 B.R. 273 (Bankr. D.S.C. 2009)	Standard unclear – did not require medical evidence and relied on "credible and convincing" testimony of debtor	Failure to 'un-do' effects of a stay violation through obtaining judgment upon learning of stay	Unclear, but seems that debtor testified to "anxiety and depression"	$1,000.00
In re Robinson, 2008 WL 4526183 (Bankr. E.D. Va Sept. 28, 2008)	Cites *Green Tree Servicing, LLC v. Taylor*, 369 B.R. 282 (S.D. W. Va. 2007) - debtor must establish "significant harm and a causal connection between the harm and the violation of stay"	Attorney - sent invoices to debtor (a former client)	Debtor testified to increased stress and blood pressure, and that doctor said she needed to reduce stress in her life	None
In re Come, 2008 WL 2018280 (Bankr. D.N.H. May 8, 2008)	*Fleet Mortgage*	Vehicle seller - believed case had been dismissed - repossessed vehicle	Debtor testified his children became upset when vehicle was repossessed, causing him distress	$1,000
In re Original Barefoot Floors of Amer., 412	Court found no stay violation, noted circuit split	Creditor dumped trash onto front yard at the home of debtors' vice president	Debtor testified to extremely shaken and fearful	No stay violation

B.R. 769 (Bankr. E.D. Va. 2008)				
In re Lofton, 385 B.R. 133 (Bankr. E.D.N.C. 2008)	Standard not stated – no medical bills incurred – relied on testimony of debtor – apparently increased damages in part b/c debtor knew the creditor's actions were prohibited	Automobile financing company – lawsuit to collect on same debt in proof of claim	Debtor testified very upset, yelling and cussing, slamming a door and almost breaking an expensive vase - embarrassed, concern over future employment	$1,500
Green Tree Servicing, LLC v. Taylor, 369 B.R. 282 (S.D. W. Va. 2007)	*Dawson II* and *Fleet Mortgage* - doesn't address proper evidentiary standard or proof	Creditor lender - broke into mobile home twice with writ of possession (once while debtor present) - placed for sale sign in window and left note: debtor had to leave	Unclear who testified to seizure, fear, went to health care provider of some sort	$2,000 for first violation $3,000 for second violation
In re Jennings, 2001 WL 1806980 (Bankr. D.S.C. Sept. 17, 2001)	Does not cite any case law - debtor was required to provide specific corroborating testimony or medical evidence	Automobile financing company - dispute over applicability of automatic stay - failed to return vehicle that it had repossessed prepetition	Debtors testified that they were upset	None - did not have corroborating testimony or medical evidence
In re Johnson, 2001 WL 1806979 (Bankr. D.S.C. June 26, 2001)	Cites an unpublished Bankr. D.S.C. opinion for availability of damages, no standard applied re proof	Bank and its attorneys - sought to enforce a lien that had been avoided	Debtor wife testified to being emotionally distraught, depressed, and embarrassed	$150.00
In re Robison,	No standard cited	Mortgage company -	Debtor's attorney	$100.00

2001 WL 1804316 (Bankr. D.S.C. Apr. 26, 2001)		recorded mortgage to perfect its lien	testified to debtors' emotional distress	
In re Covington, 256 B.R. 463 (Bankr. D.S.C. 2000)	Cites *Fleet Mortgage* - No requirement of corroborating medical testimony – must be more than "fleeting" or "inconsequential"	IRS – notices of intent to levy penalty for filing frivolous returns - dispute over applicability of stay	Debtors testified "fearful" that their bank account would be levied on	$1,000.00
In re Brockington, 129 B.R. 68 (Bankr. D.S.C. 1991)	Standard not stated	Bank - repossessed vehicle	Debtor suffered an aggravation of heart condition	None – no causation proven
In re Carrigan, 109 B.R. 167 (Bankr. W.D.N.C. 1989)	Unclear – "actual injury is somewhat imprecise, but it is real" – "outrageous nature of Screw's actions is sufficiently strong to produce the anxiety expressed by the debtor" - "egregious and far beyond what should be tolerated by a civilized society"	Individual - went to debtor's house and made verbal threats – "personal, flagrant, played out on the debtor's doorstep at night on the Sabbath"	Debtor testified to great fear, stress, anxiety, and humiliation	$1,000

Third Circuit				
In re Wingard, 382 B.R. 892 (Bankr. W.D. Pa. 2008)	*Dawson II* & some pre *Dawson II* bankruptcy cases - seems to require corroborating testimony other than testimony of debtor and his wife	Credit collection company and medical provider sent two dunning letters, and one phone call - computer error or other mistake	Husband testified: couldn't sleep and woke up worrying, elevated blood pressure, did not help existing marital problems. Wife testified: problems sleeping, upset stomach, difficulty eating, irritation at work - never treated by doctor - no missed work	None - did not meet burden of proof
In re Rosas, 323 B.R. 893 (Bankr. M.D. Pa. 2004)	Standard not stated	Taxing authority - placed notice of tax claim containing threat of foreclosure on door	Debtors - testified he and his wife embarrassed, suffered stress, upset that might lose their home - others testified similarly	$1.00 in nominal damages
In re Patterson, 263 B.R. 82 (Bankr. E.D. Pa. 2001)	Standard unclear – presumes that emotional distress damages are available, but concludes that debtor provided no evidence	Automobile financing company – sold repossessed vehicle	Debtor testified that she believed her car had been stolen and was shocked	None, but punitive damages
In re Solfanelli, 230 B.R. 54	District court affirmed bankruptcy	Bank – garnished post-petition funds after bank	Debtor testified to embarrassment,	$1.00 in nominal damages

(M.D. Pa. 1999), and 206 B.R. 699 (Bankr. M.D. Pa. 1996)	court's award of nominal damages for "embarrassment, humiliation, and mental anguish" despite no finding of pecuniary harm	declared a breach of stipulation regarding use of cash collateral and automatic stay	humiliation, and mental anguish	
In re Jackson, 1993 WL 146658 (Bankr. E.D. Pa. May 4, 1993)	Standard not stated	Bank - Continuation of foreclosure	Unclear who testified - court found "modest degree" of "mental distress"	$100 - includes award for one missed day of work
In re Wagner, 382 B.R. 892 (Bankr. E.D. Pa. 1987)	Standard unclear - "observation of the debtor's testimony" made it apparent that he experienced "some shock, alarm and fear"	Individual - burst into the debtor's home at night, turned off the lights, placed his fingers to the debtor's head as if he were holding a gun and threatened to "blow [the debtor's] brains out"	Unclear whether debtor testified to any specific damages, or if court simply concluded that those damages must have flowed from the creditor's conduct	$100
Second Circuit				
In re Burkart, 2010 WL 502945 (Bankr. N.D.N.Y. Feb 9, 2010)	*Dawson II*	Attorney – caused bank accounts to be frozen	Debtor testified very distraught, thought everything coming down around him, feared he would lose his property and business, and unable to sleep or eat for a week	None – not egregious enough to award damages without corroborating testimony
In re Seniecle, 2009 WL	Cites two N.D.N.Y. bankruptcy cases –	Bank – telephone call and nine notices – alleged	Debtor testified that the notices and the	None – no corroborating

2902939 (Bankr. N.D.N.Y. Apr. 20, 2009)	emotional distress available with corroborating evidence or if stay violation is egregious or sufficiently offensive	computer error	phone call "disturbed and upset her emotionally"	evidence, wasn't egregious or sufficiently offensive, and debtor was already close to a nervous breakdown when filed petition
In re Schultz, 2009 WL 2872858 (Bankr. N.D.N.Y. Feb 20, 2009)	Emotional distress damages available even in the absence of monetary loss - cites Bankr. N.D.N.Y. opinion - Did not require corroborating testimony, even though creditor actions not egregious	Wage garnishment - failure to take more steps to insure compliance with stay did not excuse violation	Debtor testified to having to go to the hospital for treatment because he had a pacemaker and artificial heart valve, and was put on a number of medications	$2000 for "angst" suffered when debtor thought bankruptcy was behind him
In re Griffin, 415 B.R. 64 (Bankr. N.D.N.Y. 2009)	*Dawson II* - rejects *Harchar*	Social Security Administration - billing statements requesting overpaid amounts	Debtors alleged mental anguish, psychological suffering, stress, harassment, humiliation, embarrassment, shame - no testimony	Set status conference
In re Bailey, 2007 WL 2049007 (Bankr.	Notes circuit split and says *Aiello* may read 362([n]) "too	Social Security Administration - letter attempting to collect	Plaintiff affidavit stating that collection efforts caused	Denied motion for summary judgment

S.D.N.Y. July 10, 2007)	restrictively"	overpayments, threatening to deduct from any future payments from federal agencies or to garnish wages - unclear if deliberate, or accidental - SSA argued that it was a form letter and refunded amounts collected	depression and emotional distress	
In re Dennison, 2005 Bankr. LEXIS 1368 (Bankr. D. Conn. 2005)	*Dawson II* and *Fleet Mortgage* - does not require expert testimony - testimony of debtor and wife is enough	Individual - telephone message demanding that claim be removed from bankruptcy proceeding and threatening to start criminal proceedings re NSF checks	Debtor and wife testified to dread, anxiety, nausea, extensive weight loss	$250
In re Alberto, 283 B.R. 370 (Bankr. N.D.N.Y. 2000), *rev'd on other grounds*, 271 B.R. 223 (N.D.N.Y. 2000)	No requirement of medical testimony when "clear that debtor suffered some appreciable emotional harm"	Bank – sold repossessed vehicle	Debtor testified to having to get a second job, "disruption" and "family turmoil" over only one vehicle, embarrassment from need to borrow vehicles on occasion	$500 for time away from family and additional stress
In re Robinson, 228 B.R. 75 (Bankr. E.D.N.Y. 1998)	Unclear standard – must provide more than unsworn and generalized assertions	Mortgage company – mistaken application for judgment on foreclosure action, and mailed copy of order to debtor	Papers filed alleged "concern," "upset," and necessity of reassurance to calm the debtor's fears	None – no evidence
In re Holden, 226 B.R. 809	Requires medical testimony - discusses	IRS - froze tax refund and told debtors that it would	Debtor wanted to present evidence of	Denied motion to exclude evidence

(Bankr. D. Vt. 1998)	several cases with inconsistent application and noted that conclusory analysis should be avoided	pay over refund if debtors agreed to offset debt owed to IRS - refund was to be used to bring mortgage current, and neighbors found out about situation because mortgagee was a neighbor - unclear whether deliberate or accidental	panic disorder	- on later appeal, district court affirmed award of $7,000 - *United States v. Holden*, 258 B.R. 323 (D. Vt. 2000)
First Circuit				
In re Stewart, 2010 WL 1427378 (Bankr. D. Mass. Apr. 9, 2010)	Cites *Fleet Mortgage* - Debtor's testimony sufficient, even though he did not "fully elaborate on the extent of his actual injuries"	Telephone company - repeated calls and dunning letters	Debtor testified and attested in a memorandum to "mental anguish, depression and sleepless nights"	$1,000
In re King, 396 B.R. 242 (Bankr. D. Mass. 2008)	Cites *Fleet Mortgage* and *Rivera Torres*, 432 F.3d 20 (1st Cir. 2005), noting that *Rivera Torres* concluded that *Fleet Mortgage* did not decide whether emotional distress damages are available under 362([h])	IRS - dispute over stay applicability - filed tax lien against property held by debtor's parents for the debtor	No testimony - only allegations of "extreme emotional distress, including stress and anxiety"	None - sovereign immunity barred award of emotional distress damages
In re Chew, 346	None	Creditors attached joint	None specified in	$1,000

B.R. 1 (Bankr. D. Mass. 2006)		account of debtor and non-debtor spouse	opinion	
In re Curtis, 322 B.R. 470 (Bankr. D. Mass 2005)	*Fleet Mortgage*	Mortgage company – computer self-generated letters to debtor, one of which threatened foreclosure	Debtor testified to "great stress," weight loss, vomiting, and having to seek medical treatment, which resulted in her being placed on anti-depressant medication	$15,000
In re Rosa, 313 B.R. 1 (Bankr. D. Mass 2004)	*Fleet Mortgage*	City – filed notice of tax taking in newspaper, sent letter informing debtor of taking, and recorded taking in registry of deeds - also sent notice of foreclosure	Debtor testified to lack of appetite and sleep over two weekends because he feared his house would be taken away - he received notices on Fridays and did not speak to his attorney until the following Monday	$2,000 for each weekend
In re Ocasio, 272 B.R. 815 (1st Cir. BAP 2002)	*Fleet Mortgage* - testimony of debtor and debtor's wife sufficient	Individual - verbal threats, including threat of violence	Debtor and debtor's wife testimony to fear for safety and embarrassment; hysterical; a headache; wife said he went to a doctor, but no medical records or evidence and couldn't name doctor or	$10,000

			pills	
In re Seenstra, 280 B.R. 560 (Bankr. D. Mass. 2002)	*Fleet Mortgage*	Individual - sent letters to debtors employers seeking wage garnishment	No testimony	None
In re Brigham, 2001 WL 1868123 (Bankr. D.N.H. 2001)	*Fleet Mortgage* - testimony of debtor is enough	Hospital - sent three collection notices	Debtor testified that receiving notices made her "excited," which worsened her breathing condition	$2,500
In re Putnam, 167 B.R. 737 (Bankr. D.N.H. 1994)	None	Dispute over stay applicability – failure to return repossessed propane tank	Unclear if testimony to "inconvenience and humiliation"	None
In re Fischer, 144 B.R. 237 (Bankr. D.R.I. 1992)	Standard not stated but creditor's conduct was egregious	Financial services company - repo agent told debtor she had to surrender vehicle and accused her of criminal behavior - agent attended bankruptcy meeting to repossess vehicle	Not discussed, but court said debtor had suffered "embarrassment and emotional distress"	$1,000

165

(3)

No. 09-1374

Supreme Court, U.S.
FILED
JUL. 12 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Petitioners,

v.

LOGAN T. JOHNSTON, III,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 North 44th Street
Phoenix, AZ 85018
(602) 235-9510

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Respondent

July 12, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 2

I. The Question Presented Was Neither Raised Nor Decided Below. 2

II. This Case Does Not Implicate A Circuit Split Over the Availability of Emotional-Distress Damages. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Aiello v. Providian Financial Corp.,
239 F.3d 876 (7th Cir. 2001) 1, 4, 5

Dawson v. Washington Mutual Bank,
390 F.3d 1139 (9th Cir. 2004) 2

Delta Airlines v. August,
450 U.S. 346 (1981) 1

Fleet Mortgage Group, Inc. v. Kaneb,
196 F.3d 265 (1st Cir. 1999) 4, 5

United States v. United Foods,
533 U.S. 405 (2001) 3

Youakim v. Miller,
425 U.S. 231 (1976) 2

Statutes

11 U.S.C. § 362(k)(1).....1, 2, 3, 4

Miscellaneous

Eugene Gressman, et al.
Supreme Court Practice (9th ed. 2007) 2

INTRODUCTION

Petitioners Melvin Sternberg and his law firm Sternberg & Singer (collectively "Sternberg") ask this Court to grant certiorari to decide a question that was neither raised nor decided below—namely, whether an individual injured by a willful violation of the automatic stay may ever recover damages for emotional distress under 11 U.S.C. § 362(k)(1). Because "that question was not raised in the Court of Appeals," it is "not properly before [this Court]." *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Sternberg's brief below acknowledged that emotional-distress damages are available under settled law and argued only that the evidentiary standards for recovering such damages had not been satisfied on the facts of the case.

Even if the question presented had been properly preserved, review would be unwarranted because this case does not implicate a circuit split concerning emtional-distress damages. In fact, no circuit has held that emotional-distress damages are unavailable where, as here, an individual has suffered both financial and non-financial injury as a result of an automatic-stay violation. Sternberg's claimed split rests entirely on *Aiello v. Providian Finance Corp.*, 239 F.3d 876 (7th Cir. 2001), but *Aiello*'s holding was premised on the lack of any financial injury in that case. *See id.* at 879 ("No financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362[(k)(1)] when there is no financial loss[.]"). Here, by contrast, the court below concluded that respondent Logan Johnston suffered *both* financial and non-financial loss and awarded damages for both types of injury. Pet. App. 8. Accordingly, no precedent in any circuit would categorically foreclose the damages awarded in this case.

REASONS FOR DENYING THE WRIT

I. The Question Presented Was Neither Raised Nor Decided Below.

Sternberg's petition asks this Court to decide whether damages for emotional distress are ever recoverable as "actual damages" under 11 U.S.C. § 362(k)(1). But Sternberg never raised that question in the court of appeals and the court of appeals did not decide it. The question presented, therefore, is not properly before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); Eugene Gressman, et al., *Supreme Court Practice* 464-65 (9th ed. 2007).

In his brief below, Sternberg did not argue, as he does now, that damages for emotional distress are categorically unavailable under section 362(k)(1). To the contrary, Sternberg expressly "recognize[d]" that the statute, under settled precedent, "provides for money awards for a cognizable claim for emotional distress." Sternberg CA9 Br. 19 (citing *Dawson*, 390 F.3d 1139). Sternberg did not challenge that prevailing interpretation. *See id.* at 20 n.7 (explaining, without criticizing, *Dawson*'s reasoning).

Instead, Sternberg argued only that the bankruptcy court had abused its discretion in awarding damages for emotional distress on the facts of the case. Specifically, Sternberg made three case-specific arguments: *first*, that the violation of the automatic stay in this case was not sufficiently egregious to justify the award of damages (*id.* at 19-23); *second*, that the award in this case was not supported by sufficient corroborating evidence (*id.* at 23-26); and *third*, that Johnston's damages claim

should have been barred on grounds of waiver and preclusion by the bankruptcy court's evidentiary rulings (*id.* at 26-28).

Aside from its summary rejection of all three arguments in a single footnote, the decision below contains no discussion of emotional-distress damages. App. 9. n.1. Because Sternberg did not raise it, the court did not mention, let alone decide, the question presented in the petition. This Court ordinarily does not "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods*, 533 U.S. 405, 417 (2001).

Even after the panel had issued its decision and Johnston had sought rehearing en banc on the issue of attorneys' fees—when the parties were no longer even arguably constrained by circuit precedent—Sternberg still did not contest the proposition that emotional-distress damages are available under section 362(k)(1). Indeed, Sternberg's response to Johnston's en banc petition stated that "[t]he panel's opinion . . . properly interpreted 11 U.S.C. 362(k)(1), followed proper rules of statutory construction, and did not create an intra-circuit split in the interpretation of 11 U.S.C. 362(k)(1)." Sternberg CA9 Answer to Pet. for Rehearing En Banc at 2.

The court of appeals thus never had the opportunity in this case to address the argument that Sternberg now advances concerning the availability of emotional-distress damages under section 362(k)(1). And, as explained below, review of that question would be particularly inappropriate because no circuit has foreclosed the recovery of emotional distress damages for violations of

the automatic stay under the circumstances presented here.

II. This Case Does Not Implicate a Circuit Split Over the Availability of Emotional-Distress Damages.

Sternberg principal argument in favor of certiorari is that this case implicates a circuit split over whether emotional-distress damages are ever recoverable for violations of the automatic stay. Pet. 7-11. In fact, no circuit has foreclosed the recovery of emotional-distress damages where, as here, an individual has suffered both financial and non-financial harm.

The claimed split hinges on Sternberg's contention that a single Seventh Circuit decision, *Aiello*, 239 F.3d 876, "held that damages resulting from emotional distress are not available" for automatic-stay violations. Pet. 7. But *Aiello* did not foreclose the recovery of such damages where the individual has also suffered financial injury. To the contrary, the Seventh Circuit's decision was premised in part on the lack of any allegation of financial injury in that case. *Id.* at 879 ("No financial injury is alleged in this case, and we do not think that emotional injury is compensable under section 362[(k)(1)] when there is no financial loss[.]"); *see Dawson*, 390 F.3d at 1148 ("The Seventh Circuit, in *Aiello* . . . required that an individual suffer a financial loss in order to claim emotional distress damages.").

Indeed, *Aiello* expressly distinguished *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269-70 (1st Cir. 1999), a case in which the First Circuit awarded emotional-distress damages under section 362(k)(1), because *Fleet Mortgage* involved both financial and non-financial loss. In *Fleet Mortgage*, the Seventh Circuit explained,

the "misconduct of the defendant in violating the automatic stay imposed substantial legal costs on the plaintiff, which are not alleged here." *Aiello*, 239 F.3d at 880; *see also id.* at 878 (describing *Fleet Mortgage* as "distinguishable" on this basis).

Under the Seventh Circuit's own logic, then, this case is likewise "distinguishable." *Id.* In this case, the court below held that Johnston suffered *both* financial and nonfinancial loss and awarded damages for both types of injury. *See* App. 8 (affirming the bankruptcy court's award of financial damages to Johnston "because the stay violation had hindered his ability to work"). This case therefore does not implicate a circuit split. No precedent in any circuit would categorically foreclose the damages awarded in this case.

Sternberg's petition attempts to dismiss this critical factual difference between *Aiello* and the decision below by characterizing *Aiello*'s acknowledgement that emotional-distress damages may be awarded when accompanied by financial loss as describing only a "theoretical possibility." Pet. 8. To be sure, *Aiello* did not squarely hold that emotional-distress damages are recoverable when accompanied by financial injury; the Seventh Circuit merely speculated that such damages could be recovered in light of bankruptcy's equitable "clean up" doctrine, as a means of "topping off" financial damages with other damages suffered, "including emotional distress if adequately proved." *Aiello*, 239 F.3d at 879. But the decision discussed this as a "theoretically possibility" only because that case did not involve an allegation of financial damages. That the Seventh Circuit has not yet had occasion to address the question in a case in which it was actually presented is further reason to deny certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 N. 44th Street
Phoenix, AZ 85018
(602) 235-9510

Counsel for Respondent

July 12, 2010

No. 09-1374

JUL 2 3 2010

In The
Supreme Court of the United States

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Petitioners,

v.

LOGAN T. JOHNSTON, III,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DONALD B. AYER
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-4689

Co-Counsel for Petitioner

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 North Central Ave.
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@LRlaw.com

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE AUTHORITIES ii

1. Contrary to Respondent's Contention, The Question Presented Was Pressed And Passed On Below..... 1

2. The Circuits Are Indeed Split Over Emotional Distress Damages Under 362(h)..... 5

3. Resolution By This Court Is Urgent 7

4. The Decision Below Is Wrong..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aiello v. Providian Fin. Corp., 239 F.3d 876 (7th Cir. 2001) 5, 6, 7

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) 2, 3

In re Dawson, 390 F.3d 1139 (9th Cir. 2004) 2, 3, 5, 8

Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 367 F.3d 1174 (9th Cir.), *rev'd*, 390 F.3d 1139 (9th Cir. 2004) 6

Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1 (B.A.P. 9th Cir. 2002) 7

Fleet Mortg. Group, Inc. v. Kaneb, 196 F.3d 265 (1st Cir. 1999) 5

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 4

In re Repine, 536 F.3d 512 (5th Cir. 2008) 5

Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010) 2, 3, 4, 5

United States v. Mayer, 560 F.3d 948 (9th Cir. 2009) 2

United States v. Williams, 504 U.S. 36 (1992) 1, 2

Verizon Communs., Inc. v. F.C.C., 535 U.S. 467 (2002) 1, 4

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 4

TABLE OF AUTHORITIES – Continued

Page

RULES, REGULATIONS AND STATUTES

United States Code:
11 U.S.C. § 362(h) ..... *passim*

Pub. L. No. 109-8 § 305(1)(B), (C) (2005) 1

OTHER AUTHORITIES

17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036 (2007) 2

www.StayViolation.com 7

REPLY BRIEF OF PETITIONERS

The Petition for Certiorari demonstrates that a clear circuit split on the availability of emotional distress damages for violations of the automatic stay under 11 U.S.C. § 362(h), now § 362(k)(1),[1] has resulted in dozens upon dozens of sharply divergent reported decisions by bankruptcy courts all over the country. This is a problem of real concern, with creditors in the current avalanche of bankruptcy filings facing liability for emotional distress damages in some bankruptcy courts and not others. Federal bankruptcy law is not being uniformly interpreted, and direction by this Court is sorely needed. Nothing in the Brief in Opposition ("BIO") calls any of this into question.

1. Contrary to Respondent's Contention, The Question Presented Was Pressed And Passed On Below.

For an issue to be properly presented for Supreme Court review, it must have been "'pressed or passed upon below.'" *See Verizon Communs., Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). The rule

---

[1] As noted in the Petition, Section 362(h) of the Bankruptcy Code was renumbered as Section 362(k)(1) but otherwise unchanged in 2005. Pub. L. No. 109-8 § 305(1)(B), (C) (2005). The actions at issue took place before the amendment. To avoid confusion, Section 362(h) is used for all section references in this Reply as in the Petition.

"operates . . . in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41. "It is enough for certiorari that the petition addresses a rule that formed a foundation for the court of appeals decision." 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036, at 50 (2007).

The Ninth Circuit expressly rejected Petitioners' challenge to the award of emotional distress damages, relying squarely on its recent holding in *In re Dawson*, 390 F.3d 1139 (9th Cir. 2004). It said:

> While Sternberg also argues that the bankruptcy court's emotional distress award was an abuse of discretion, this issue does not merit a lengthy discussion. Each of Sternberg's arguments is foreclosed by *Dawson*. . . .

Sternberg v. Johnston, 595 F.3d 937, 943, n.1 (9th Cir. 2010).

Dawson held categorically that "the 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay . . . include damages for emotional distress." 390 F.3d at 1148. *Sternberg* expressly reaffirmed *Dawson* as the basis for affirming the award of such damages here. That is hardly surprising given that a three-judge panel of the Ninth Circuit cannot overrule another panel. *See United States v. Mayer*, 560 F.3d 948, 964 (9th Cir. 2009). Thus, the panel clearly "passed upon" the issue presented. *Cf. Citizens*

United v. Fed. Election Comm'n, 130 S. Ct. 876, 892-93 (2010) (addressing issue even though lower court "did not provide much analysis . . . because it could not ignore the controlling Supreme Court" precedent).

The Ninth Circuit's reaffirmation of *Dawson* came in response to Sternberg's consistent claim that "it was error to award *any* damages for emotional distress." *See* Appellant's Opening Brief, *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) (No. 08-15721), 2008 WL 413394, at *23 (emphasis added). As Johnston concedes, seeking an avenue on which to prevail even in the face of *Dawson*, Sternberg argued that emotional distress damages should not have been awarded because his conduct was not egregious, the evidence did not support such damages, and the damages claim had been waived or precluded by evidentiary rulings. BIO at 2-3.

Sternberg's effort to tailor his argument against emotional distress damages in view of the broad *Dawson* holding does not alter the fact that the court below reaffirmed and relied directly on that holding in response. In the face of such a clear ruling, there is ample precedent for advancing a new, broader argument to this Court, including that existing precedent should be overruled, where, as here, the new argument supports its consistent claim. *See Citizens*

United, 130 S. Ct. at 893; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).[2]

Johnston incorrectly cites Sternberg's response to Johnston's en banc petition, to suggest that Sternberg conceded that the Ninth Circuit opinion on emotional distress damages was proper and did not create an intra-circuit split. BIO at 3 (quoting Appellants' Answer to Petition for Rehearing en Banc ("Appellants' Answer"), *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010) (No. 08-15721), at 2). Sternberg's response brief addressed only the attorneys' fees ruling, with no mention whatsoever of emotional distress damages. The only issue presented in Johnston's petition for rehearing was whether "the Panel properly determine[d] the recovery of attorney's fees recoverable under 11 U.S.C. § 362(k)(1)." Appellants' Answer at 1.

---

[2] Even when a petitioner fails to press an issue below, certiorari may be appropriate when the court of appeals has passed on an issue that is "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal citations and internal quotation marks omitted); *cf. Verizon Communs.*, 535 U.S. at 530 (noting that certiorari is appropriate when the court of appeals passes on a "significant issue," even where a party waived the issue).

2. The Circuits Are Indeed Split Over Emotional Distress Damages Under 362(h).

Respondent says nothing about the 109 decisions of lower courts struggling with the split of authority over whether mandatory Section 362(h) "actual damages" include compensation for emotional distress. Lower courts interpret *Aiello v. Providian Fin. Corp.*, 239 F.3d 876 (7th Cir. 2001), to preclude an award of emotional distress damages, and interpret *Dawson* and *Sternberg* to require such damages whenever a reasonable person under the circumstances would suffer significant emotional harm. *Dawson*, 390 F.3d at 1150; Pet. App. 102-27. As confirmed by the *amicus* brief of the American Bankers Association, there is a real circuit split and a real problem that should be addressed now, not later.

Johnston does not contest that the Ninth Circuit below expressly followed and reiterated its previous *Dawson* ruling that emotional distress damages are recoverable, even if the stay violation was not egregious, and despite the lack of corroborating evidence. *Sternberg*, 595 F.3d at 943, n.1. Johnston likewise does not contest that the First and Fifth Circuits presume that emotional distress damages for automatic stay violations are permissible under Section 362(h) where there is "specific information" about the distress rather than "generalized assertions." *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999) (described as *dicta* in *In re Torres*, 432 F.3d 20, 28-29 (1st Cir. 2005)); *In re Repine*, 536 F.3d 512, 521-22 (5th Cir. 2008).

The Seventh Circuit flatly disagrees with these interpretations of Section 362(h), and says that the protection of the automatic stay "is financial in character" and was not drafted "to redress tort violations." *Aiello*, 239 F.3d at 879-80. The Seventh Circuit's theoretical musing that, in extreme cases of extortion or intimidation coupled with financial injury, the bankruptcy court might use equitable doctrines to top off relief under Section 362(h) with state tort law causes of action, *id.* at 879, does not suggest that such relief would *ever* be available under Section 362(h).

Indeed, Respondent acknowledges that "*Aiello* did not squarely hold that emotional-distress damages are recoverable when accompanied by financial injury," and that it "merely speculated" about the availability of such damages under the "clean up" doctrine as "theoretical possibility." BIO at 5. The express recognition that emotional distress damages might be possible if one "hitches" a tort cause of action to a Section 362(h) claim proves that such relief is not available in the Seventh Circuit without the exercise of supplemental jurisdiction to add it. *Aiello*, 239 F.3d at 880. Such relief is clearly unavailable in the Seventh Circuit under Section 362(h) itself.

The Ninth Circuit initially followed *Aiello*, then rejected it on reconsideration. *Dawson v. Wash. Mut. Bank, F.A. (In re Dawson)*, 367 F.3d 1174, 1180-81 (9th Cir.), *rev'd*, 390 F.3d 1139 (9th Cir. 2004). The circuit split is cleanly and sharply defined, and is

very unlikely to end without this Court's intervention.

3. Resolution By This Court Is Urgent.

The "cottage industry" of stay violation damages litigation with websites trumpeting damages awards and settlements needs to end. *See Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11-12 (B.A.P. 9th Cir. 2002); *www.StayViolation.com*. Debtors and their counsel recognize emotional distress damages claims as a common and easy source of money, since any inadvertent or good faith stay violation is compensable and no medical treatment is necessary. *See Aiello*, 239 F.3d at 880 (claims of emotional distress are easy to manufacture). If the Court delays acceptance of certiorari, many creditors, including agencies of the United States government such as the Internal Revenue Service, Social Security Administration, Department of Veterans Affairs, and the Department of Education, will be forced to pay damages that the law does not allow and expend resources litigating countless emotional distress claims that should be dismissed at the outset. The problem continues to fester and escalate as the volume of bankruptcy filings increases.

4. The Decision Below Is Wrong.

Neither the language of Section 362(h) nor the historical record surrounding its enactment supports the position of courts that allow the award of

emotional distress damages. The Ninth Circuit opined that the statute was enacted in part to address "the emotional and psychological toll" of a stay violation. *Dawson*, 390 F.3d at 1148. Rather, Section 362(h) was enacted to provide a statutory remedy for automatic stay violations that were historically handled through contempt actions, at a time when the jurisdictional ability of bankruptcy courts to order contempt had been called into question. There is no evidence that Congress intended to change the historical unavailability of emotional distress damages in contempt proceedings, or to create a cause of action or remedy not generally available at common law for torts associated with wrongful debt collection. Petition at 18-21.

Respondent simply does not address these issues, and he does not dispute the previous holdings of this Court that damages awards under statutes that protect financial interests rather than human dignity and reputations do not authorize emotional distress awards, or that the Bankruptcy Code is primarily designed to adjust economic interests. He says nothing about debtors using the stay not as a shield but as a sword to extract damages awards in the event of any good faith, inadvertent stay violation, or about the impact of such litigation on the federal government as well as financial institutions and miscellaneous creditors. Petition at 16-17. In short, the brief in opposition does not dispute that the decision below and the Ninth Circuit's *Dawson* holding are wrong.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA, LLP
40 N. Central Ave.
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@LRlaw.com

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965

Counsel for Petitioner

DONALD B. AYER
JONES DAY
51 Louisiana Ave. N.W.
Washington, D.C. 20001
(202) 879-4689

Co-Counsel for Petitioner

Supreme Court, U.S.
FILED
JUN 10 2010
OFFICE OF THE CLERK

No. 09-1374

In the Supreme Court of the United States

MELVIN STERNBERG,
Petitioner,

v.

LOGAN T. JOHNSTON
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Gregory F. Taylor
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028
gtaylor@aba.com

Counsel of Record

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The Current Lack of an Authoritative Statement on Damages for "Emotional Distress" is Being Felt within the Banking Industry 4

B. The Court Should Take the Opportunity to Hold that Damages for "Emotional Distress" are not Available to the Debtor for Violations of the Automatic Stay 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Aiello v. Providian Financial Corp., 239 F.3d 876 (7th Cir. 2001) 3, 8

Citizens Bank v. Strumpf, 37 F.3d 155 (4th Cir. 1994), *rev'd on other grounds, 516 U.S. 16 (1995)* 6

Eskanos & Adler, P.C. v. Roman, 283 B.R. 1 (B.A.P. 9th Cir. 2002). 6

Fleet Mortg. Group v. Kaneb, 196 F.3d 265 (1st Cir. 1999) 6

Price v. United States, 42 F.3d 1068 (7th Cir. 1994) 6

Statutes

11 U.S.C. § 362(a) 2

11 U.S.C. § 362(k)(1) 2, 3, 6, 7

Other Authorities

American Bankruptcy Institute, "Bankruptcy Filing Statistics Annual Filings - Annual Business and Non-business Filings by Year (1980-2009)." 4

Committee on Financial Services United States House of Representatives, "Statement for the Record by the American Bankers Association, (May 18, 2010). 4

TABLE OF AUTHORITIES
(continued)

Press Release, National Bureau of Economic Research, "NBER Committee Confers: No Trough Announced" (April 12, 2010). ____ 4

1

INTEREST OF *AMICUS CURIAE*[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state chartered. ABA member banks hold the majority of the domestic assets of the banking industry in the United States.

At first blush it may seem unusual for a trade association representing the financial services industry to file an *amicus* brief in a matter that that has its genesis in a divorce proceeding. Indeed, the ABA takes no position regarding the relative merits of the core dispute between the Petitioner and the Respondent in this case. However, the discrete legal issue presented to the Court for its consideration is of importance to the ABA and its members. Banks and other financial institutions frequently deal with customers who seek the protection of the Bankruptcy Code in order to get a fresh start after a financial setback. While the banking industry has an admirable record of compliance with the automatic stay

[1] The parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing. The consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

provision of the Bankruptcy Code, 11 U.S.C. § 362(a), some inadvertent errors are inevitable. As a result, ABA's members have a direct interest in the outcome of this litigation as it construes the nature (and, therefore, the measure) of damages that would be available to a debtor pursuant to 11 U.S.C. § 362(k)(1) (formerly 11 U.S.C. § 362(h))[2] should a financial institution violate the automatic stay.

SUMMARY OF ARGUMENT

Rather than recapitulate the arguments ably posited by the Petitioner in his brief, the ABA wishes to take the opportunity to emphasize two distinct points.

First, the Court should grant the petition because the resolution of the legal issue concerning the type and nature of damages that may be awarded pursuant to 11 U.S.C. § 362(k)(1) will affect more than just the litigants currently before the Court. Banks and other providers of financial services to the public, like other creditors, have not been immune to litigation involving claims of damages for "emotional distress" for alleged violations of the automatic stay. Because ABA's members are being subjected to claims for damages that the law may not (and in the ABA's opinion, should not) allow, the ABA respectfully submits that the Court

---

[2] For the sake of clarity, the ABA will refer to the current codification of this provision at 11 U.S.C. § 362(k)(1) throughout this brief.

should take this opportunity to resolve any doubt regarding the proper scope of 11 U.S.C. § 362(k)(1).

Second, ABA strongly believes that the Court should take the opportunity to grant review in this case and resolve the split in authority among the Circuits by adopting the rule enunciated by the United States Court of Appeals for the Seventh Circuit in *Aiello v. Providian Financial Corp.*, 239 F.3d 876 (7th Cir. 2001), holding that damages for "emotional distress" are not available to a debtor for violations of the automatic stay. This common-sense formulation of the law would help rein in some of the more abusive aspects of automatic stay litigation that arise from inadvertent or "technical" violations of the automatic stay.

ARGUMENT

As discussed in Petitioner's Brief (at p. 7), there is currently a split among the Circuits regarding whether damages for "emotional distress" are available to individual debtors for violations of the automatic stay. ABA strongly urges the Court to grant review in this case in order to eliminate doubt and to bring uniformity to the jurisprudence regarding the types of damages that are available (or not available) for a breach of the automatic stay.

A. THE CURRENT LACK OF AN AUTHORITATIVE STATEMENT ON DAMAGES FOR "EMOTIONAL DISTRESS" IS BEING FELT WITHIN THE BANKING INDUSTRY

Banks are a reflection of their communities,[3] and the financial difficulties experienced by its customers are quickly felt by the financial institutions that have the privilege of receiving their patronage. While it appears that the national economy has begun a tentative recovery from the worst recession in recent memory (even if there is some disagreement as to when the recovery began[4]), it will still be some time yet before all of the effects of the recession are completely behind us and the economic recuperation is complete.

One venue where the lingering effects of the recession is being felt is in the Bankruptcy Courts. According to statistics compiled by the American Bankruptcy Institute,[5] the number of new bank-

---

[3] Committee on Financial Services United States House of Representatives, "Statement for the Record by the American Bankers Association, (May 18, 2010). Retrieved on June 4, 2010 at http://www.aba.com/NR/rdonlyres/222CE044-577A-11D5-A184-00508B95258D/66810/FinalStatementfortheRecordSmallBusinessLendingFund.pdf.

[4] See Press Release, National Bureau of Economic Research, "NBER Committee Confers: No Trough Announced" (April 12, 2010). Retrieved on June 4, 2010 at http://www.nber.org/cycles/april2010.pdf.

[5] American Bankruptcy Institute, "Bankruptcy Filing Statistics Annual Filings – Annual Business and Non-business Filings by Year (1980-2009)." Retrieved on June 4, 2010 at

ruptcy proceedings per annum more than doubled between 2006 and 2009, jumping from 617,660 to 1,473,675 total filings. Of that latter figure, nearly 96% of the total filings – 1,412,838 – were by individual consumers.

The dramatic increase in the number of individual bankruptcies during the recent recession presents a burgeoning compliance and a risk management issue for banks and savings institutions. One need not be an economist to recognize that it is very common for banks and other financial institutions to have customers who are seeking a fresh start under the protection of the Bankruptcy Code. Although the ABA knows of no bank-specific statistics upon which to draw, one may reliably surmise that the recent surge in the number of individual bankruptcy filings has resulted in a proportional increase in the number of bank or savings association customers who now must be accorded special treatment consistent with the requirements of the Bankruptcy Code. This treatment affects many aspects of a debtor's relationship with his or her bank, including the handling of past due or defaulted loans or other obligations.

The Bankruptcy Code requires that, while the automatic stay is in effect, a bank must desist in its efforts to collect sums owed to it by a debtor. 11

---

http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6229.

U.S.C. § 362(a). A "willful" violation of the automatic stay entitles a debtor injured by such a breach to "recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1).

Despite the inclusion by Congress of a "willful" standard in the statute and the necessity that a debtor must prove his or her injury, actions seeking damages for alleged violations of the automatic stay are easy to bring, and have become a thriving "cottage industry." *See Eskanos & Adler, P.C. v. Roman*, 283 B.R. 1, 11-12 (B.A.P. 9th Cir. 2002). A "willful violation" does not require a specific intent to violate the stay, but rather knowledge (imputed or actual) of the bankruptcy filing coupled with an intentional (i.e., volitional) action that results in a violation, with actual good faith on the part of an honest-but-errant creditor being simply irrelevant.[6]

Banks are especially easy targets for debtors and their counsel who wish to take advantage of an inadvertent error or an honest mistake on the part of a financial institution in dealing with a customer who has filed for bankruptcy. Despite the very best efforts of bank counsel or compliance staff to alert the relevant employees or vendors to immediately

---

[6] *See Fleet Mortg. Group v. Kaneb*, 196 F.3d 265, 268-69 (1st Cir. 1999) (citing cases); *Price v. United States*, 42 F.3d 1068, 1071 (7th Cir. 1994) ("A 'willful violation' does not require a specific intent to violate the automatic stay."); *Citizens Bank v. Strumpf*, 37 F.3d 155, 159 (4th Cir. 1994) ("To constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay"), *rev'd on other grounds*, 516 U.S. 16 (1995).

honor a bankruptcy automatic stay, mistakes can happen. A bank employee does not act promptly enough to halt an effort to collect a debt. An automated collection notice is sent out post bankruptcy due to a data processing error. In the majority of the cases, once a bank discovers its error, it takes corrective action as soon as it can. The "damage" for the purposes of the Bankruptcy Code, however, may already be done.

The result is that banks and other providers of financial services to the public, like other creditors, are not immune to litigation over alleged violations of the automatic stay. While it appears that there is no ready way to capture the number of alleged violations of the automatic stay that involve banks (or to break out the percentage of claims that specifically seek damages for "emotional distress"), the anecdotal experience of the ABA's members suggests that it is very common for banks or savings institutions to become the target of this type of litigation.

The ABA urges the Court to grant the petition. Deferring this opportunity to resolve the split in the circuit on this point of law will only perpetuate uncertainty and facilitate further litigation. More fundamentally, the absence of an authoritative statement from the Court resolving the split in the Circuits on whether this type of damages may be awarded pursuant to 11 U.S.C. § 362(k)(1) will subject creditors to claims that the law should not allow and, in a number of Circuits, does not allow. Accordingly, the ABA submits that this case pro-

vides an ideal opportunity to finally resolve this important legal question.

B. THE COURT SHOULD TAKE THE OPPORTUNITY TO HOLD THAT DAMAGES FOR "EMOTIONAL DISTRESS" ARE NOT AVAILABLE TO A DEBTOR FOR VIOLATIONS OF THE AUTOMATIC STAY.

The ABA also submits that the Court should grant the petition so that it may resolve a split in authority among the Circuits by adopting the rule enunciated by the United States Court of Appeals for the Seventh Circuit in *Aiello v. Providian Financial Corp.*

In *Aiello*, the Seventh Circuit held that damages for "emotional distress" are not available for violations of the automatic stay because the Bankruptcy Code protects only a debtor's financial interests. The court reasoned that emotional distress claims "are so easy to manufacture," and adequate remedies are available under state tort law:

> Th[e] protection [of the automatic stay], however, is financial in character; it is not protection of peace of mind.... The Bankruptcy Code was not drafted with reference to the emotional incidents of bankruptcy, however, and bankruptcy judges are not selected with reference to their likely ability to evaluate claims of emotional injury. That is not to suggest that victims of tortious infliction of emotional distress in the course of a

> bankruptcy proceeding are orphans of the law. A creditor who resorts to extortion or intimidation exposes himself to a suit under state tort law.... The office of section 362(h) is not to redress tort violations but to protect the rights conferred by the automatic stay.

Id. at 879-80. The ABA submits that granting the petition and adopting this common-sense formulation of the law will help rein in some of the more abusive aspects of litigation over violations of the automatic stay and spurious claims of harm that arise from inadvertent or "technical" violations of the statute.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Gregory F. Taylor
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028
gtaylor@aba.com
COUNSEL OF RECORD

Dated: June 10, 2010